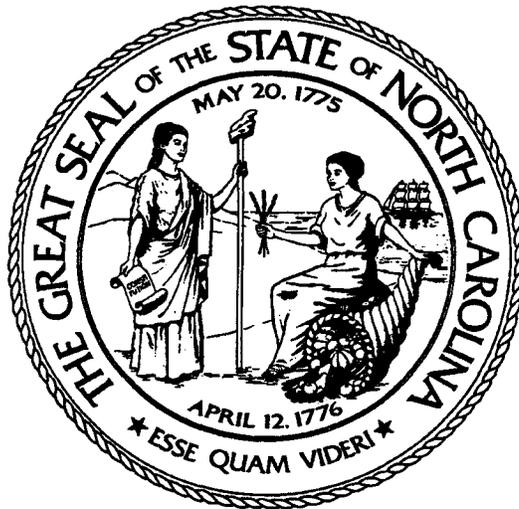


**LEGISLATIVE
RESEARCH COMMISSION**

IMMUNITY FROM NEGLIGENCE



**REPORT TO THE
1995 GENERAL ASSEMBLY
OF NORTH CAROLINA**

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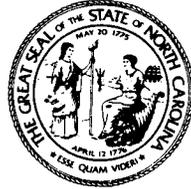
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STATE OF NORTH CAROLINA
LEGISLATIVE RESEARCH COMMISSION
STATE LEGISLATIVE BUILDING
RALEIGH 27601-1096



January 11, 1995

TO THE MEMBERS OF THE 1995 GENERAL ASSEMBLY:

The Legislative Research Commission herewith submits to you for your consideration its final report on Immunity from Negligence. The report was prepared by the Legislative Research Commission's Committee on Immunity from Negligence pursuant to G.S. 120-30.17(1).

Respectfully submitted,


Daniel T. Blue, Jr.
Speaker of the House


Marc Basnight
President Pro Tempore

Cochairmen
Legislative Research Commission



1993-1994

LEGISLATIVE RESEARCH COMMISSION

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PREFACE

The Legislative Research Commission, established by Article 6B of Chapter 120 of the General Statutes, is the general purpose study group in the Legislative Branch of State Government. The Commission is cochaired by the Speaker of the House and the President Pro Tempore of the Senate and has five additional members appointed from each house of the General Assembly. Among the Commission's duties is that of making or causing to be made, upon the direction of the General Assembly, "such studies of and investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" (G.S. 120-30.17(1)).

The Legislative Research Commission, prompted by actions during the 1993 Session, has undertaken studies of numerous subjects. These studies were grouped into broad categories and each member of the Commission was given responsibility for one category of study. The Cochairs of the Legislative Research Commission, under the authority of G.S. 120-30.10(b) and (c), appointed committees consisting of members of the General Assembly and the public to conduct the studies. Cochairs, one from each house of the General Assembly, were designated for each committee.

The study of Immunity from Negligence would have been authorized by Part II, Section 2.1 (17) of the 2nd Edition of House Bill 1319 which passed both chambers but inadvertently was among the bills not ratified at the end of the 1993 Session.

Part II of the 2nd Edition of House Bill 1319 would allow studies authorized by that Part for the Legislative Research Commission to consider House Bill 242 in determining the nature, scope and aspects of the study. Section 1 of House Bill 242 reads in part: "The Legislative Research Commission may study issues concerning immunity from liability resulting from negligent acts, including the coordination of

existing statutes granting immunity, the immunity of State and local employees and officials, and the immunity of volunteers including volunteers of professional services." The relevant portions of the 2nd Edition of House Bill 1319 and House Bill 242 are included in Appendix A. The Legislative Research Commission authorized this study in the Fall of 1993 under authority of G.S. 120-30.17(1) and grouped this study in its Civil and Criminal Law area under the direction of Representative Bertha M. Holt. (House Bill 1319 was later amended and ratified in 1994 with the Legislative Research Commission studies 2nd Edition language deleted because the Legislative Research Commission had already acted on these matters).

The Committee was chaired by Senator Leslie J. Winner and Representative Margaret M. Jeffus. The full membership of the Committee is listed in Appendix B of this report. A committee notebook containing the committee minutes and all information presented to the committee is filed in the Legislative Library.

COMMITTEE PROCEEDINGS

First Meeting -- January 27, 1994

At its organizational meeting on January 27, 1994, the Immunity from Negligence Study Committee first reviewed its study charge. Three main areas were identified as needing study:

- Review inconsistencies in statutes and determine if some uniformity is needed.
- Immunity for state and local government employees.
- Immunity for volunteers, including volunteers rendering professional services.

O. Walker Reagan, counsel for the Committee, reviewed eleven bills pending before the General Assembly that involved some form of immunity issues. He then reviewed current statutory law where various forms of immunity have been granted. Over sixty different statutes were cited involving immunity. Mr. Reagan classified these statutes into three groups: volunteer immunity, public-good immunity, and investigative, licensing and regulatory immunity.

Next Jeffrey S. Koeze of the Institute of Government discussed with the Committee his paper entitled, "Conceptual Overview of Immunity Law", which includes a discussion of the public liability doctrine, sovereign immunity and public official immunity. Mr. Koeze also explained why liability issues for local governments were somewhat different from those of state government, primarily because local government's proprietary functions are not protected by sovereign immunity.

Second Meeting -- April 6, 1994

The second meeting of the Committee began with a presentation by Professor Charles E. Daye of the UNC Law School, and co-author of the book, North Carolina Law of Torts, on a general overview of immunity from liability under North Carolina law. Professor Daye pointed out that immunity law is broken down into four fundamental areas: sovereign immunity to governmental bodies, familial immunity, charitable immunity, and other immunities. He also discussed that under current law, any case brought against a local government includes the question of whether the negligent act arose from the exercise of a governmental function or a proprietary function. Professor Daye explained that some immunities could be waived, such as the

state has done with the North Carolina Tort Claims Act. In considering whether to grant immunity or not, Professor Daye pointed out that the law does not want the risk of liability to discourage people from doing good things, but on the other hand the law wants people to be responsible for their actions.

The Committee next heard from E. Harry Bunting, Special Deputy Attorney General for North Carolina, on the workings of the State Tort Claims Act. Mr. Bunting pointed out that the Torts Claim Act is a limited waiver of immunity, applicable only to claims against the State, not its employees. He also pointed out that the recent case of Coleman v. Cooper had extended the State's liability under the Tort Claims Act to claims against county Departments of Social Services arising from negligent acts of county child protective services social workers. Mr. Bunting also explained that his office defended state employees under the Defense of State Employees Act, for claims against state employees acting in the scope of their employment, for claims up to the tort claim limit. Additionally, Mr. Bunting pointed out that the General Assembly has authorized the State to purchase state employee excess liability insurance coverage as protection for claims over the tort limit up to a limit of \$1 million, but explained that automobile liability claims against employees are not included in this excess coverage. He explained that claims paid by the State under both the Tort Claims Act and the Defense of State Employees Act are paid by the individual agencies out of their regular budget, and that agencies pay a pro-rata share of the excess liability premium based on the number of employees they have.

The Committee then heard from Jeffrey Koeze and reviewed his suggestions for possible solutions to the governmental liability and immunity issues as outlined in a letter to Senator Leslie Winner, dated April 4, 1994, a copy of which is included as Appendix C. Mr. Koeze discussed the problem of distinguishing when a person is a public official (and thereby immune) and when the person is a public employee (and thereby liable). He also explained the Federal Tort Claims Act.

Next the Committee heard from various speakers concerning the issue of liability and immunity for child protective services social workers. Ms. Janet Mason, from the Institute of Government, spoke on the history of social worker liability, and how the law had been changed by the Coleman v. Cooper case. Roslyn Savitt, representing the North Carolina Chapter of the National Association of Social Workers, discussed the concerns social workers have over personal liability arising from attempting to do their jobs and how social service departments are having difficulty recruiting child protective services social workers because of the concern over liability. Steve Shaber,

representing the Social Services Consortium, discussed how he felt the N.C. Court of Appeals was wrong in its interpretation of the child abuse reporting statute which had always been assumed to have granted immunity to anyone, who in good faith, reported and assisted in the investigation of child abuse cases, including social workers. Mr. Shaber proposed that a bill be recommended which codified what he believed was the Legislature's intent to grant child protective services social workers good faith immunity. Ms. Patrice Roesler spoke on behalf of the North Carolina Association of County Commissioners and asked the Committee to consider whether the fear of personal liability had become so pervasive that it was impairing judgments child protective services social workers had to make to protect children. She also encouraged the Committee to look at the broader issue of governmental employee immunity because issues were also being raised concerning the liability of sanitarians, public health employees and local building inspectors. The Committee also heard from Mr. Doug Abrams on behalf of the North Carolina Academy of Trial Lawyers. Mr. Abrams had represented the mother of the two deceased children in the Coleman case. Mr. Abrams urged the Committee to be careful in recommending broad based immunity. While he said if social workers were doing their jobs and following the guidelines, they should not be held responsible if something goes wrong, if someone gets hurt as a result of a social worker's negligence, the person should be compensated. He also stated his belief that the risk of liability helped social workers be more careful and do a better job.

Third Meeting -- August 19, 1994

The third meeting of the Committee began with a review by Mr. Reagan of actions taken by the 1994 Session of the General Assembly as it related to immunity issues, including raising the Tort Claims limit from \$100,000 to \$150,000. Next Mr. Reagan outlined for the Committee focus questions to direct the discussion on local and state government liability issues including:

- Is the public adequately protected from negligent acts of state and local government employees?
- Are state and local government employees adequately protected from claims made against them personally for negligent acts or omissions arising in the course and scope of their employment?
- Is the liability for negligent acts of local government employees carrying out state functions properly allocated?

The next speaker was James B. Blackburn, General Counsel for the North Carolina Association of County Commissioners, who discussed local government liability insurance coverage and local government liability. Mr. Blackburn explained how the Association had established its own insurance pool, which now covers 65 counties. He also explained that most other counties had coverage through other private companies, or have set up their own self-insurance programs. Mr. Blackburn explained that their policy insuring local government employees had a \$2 million limit and covered all governmental employees, including child protective services social workers, for whom they had had no claims. Mr. David Parker, Claims Representative for Sedgwick James of the Carolinas, third party administrators for the Association's program, discussed the types and sizes of claims he has handled for counties.

The next speaker was Ms. Sheila Warner of K & K Specialties, agent for two private companies insuring local government. Her agency covers twelve counties and 177 municipalities. The policies she represents provide the same types of general coverage as does the Association's plan, but with \$1 million limits. She also indicated they had not handled any claims against social workers.

The next two speakers were Mr. Phil Bell, Risk Manager for Forsyth County and Mr. Fred Marshall, Risk Manager for the City of Winston-Salem. Each of these local governments operate their own self-funded risk management programs. After explaining how their programs were funded, the speakers discussed the legal authority under which claims were paid and how their self-insurance program had been found by the North Carolina Supreme Court to not constitute a waiver of sovereign immunity. On claims arising from governmental functions, sovereign immunity is retained by the government, but the government may elect to defend the local government employee. The option of defending the employee and retaining sovereign immunity is used as leverage for the settlement of claims. Where, in their opinion, liability exists they will pay for actual damages, but not pain and suffering. When a case cannot be settled and the employee is sued, the local employee is indemnified up to his net worth plus \$10,000. In cases that are unclear whether the function is governmental or proprietary, the government can elect to pay as a proprietary claim or defend under sovereign immunity.

The next speakers were Mr. Dascheil Propes and Mr. Joe Rippard, with the Department of Insurance, who discussed the State's liability claims and insurance. Mr. Propes discussed broad discretion the Attorney General has in deciding whether to defend state employees, which determines whether the State pays a claim. He pointed

out that for claims in excess of the tort claims limit, the State's policy made the state employees the deep pocket to be sued. He thought this was unfair to the employee and the injured public. In reference to local employees carrying out state functions, Mr. Propes pointed out that in addition to sanitarians and social workers, local building inspectors also have a lot of exposure. Mr. Propes also explained how the State managed claims arising from the operation of motor vehicles, through a self-insurance arrangement, but pointed out that the limit of coverage was \$150,000, not \$1 million under the state employee excess liability policy. As to the state employees excess liability insurance policy, Mr. Propes explained that the State was paying annual premiums of \$560,000, but its claims history over the last seven to ten years only showed a total payout of between \$200,000 and \$300,000. He acknowledged that the State would come out ahead if it created its own insurance trust to pay these claims.

Mr. Joe Rippard explained the role of the Public Officers and State Employees Liability Insurance Commission as being responsible for overseeing the commercial insurance market for local governments and for overseeing the excess liability coverage for state employees. He pointed out that the excess liability policy only covers individuals on state payroll, and not social workers, local government employees or public school teachers. Mr. Rippard also explained how the state's administration of automobile claims is handled with the Travelers Insurance Company.

The Committee then discussed its preliminary areas for recommendations to focus on and decided to appoint a subcommittee to prepare preliminary bill drafts. The Committee agreed that the drafts should address:

- Sovereign immunity differences in different parts of the state.
- Indemnifying state and local government employees for excess liability.
- Raising the State tort claims limit.
- Covering intentional torts.
- Creating uniformity in coverage across the state and between state and local governments.
- Strengthening the State's duty to defend its employees.
- Establishing a self-insurance trust to cover excess liability claims against state employees.

Fourth Meeting -- September 29, 1994

At its fourth meeting, the Committee received a report from its subcommittee which handed out three bill drafts as working documents to address the issues identified by the Committee at its previous meeting. The three drafts, entitled Local Government Liability Act, State Employees Liability Act and State Tort Liability Act, were handed

out to the members and to the public with the request for comments prior to the next meeting (Copies are attached as Appendices D, E and F). Senator Winner explained that the subcommittee had held three one and one-half hour telephone conference calls and had reviewed several revisions to these drafts before agreeing on versions to recommend to the Committee for review. She explained that the subcommittee was not wed to these particular drafts, but the subcommittee felt the drafts identified the important issues and offered at least one possible solution to address each issue. She pointed out that the State Employees Liability Act and the State Tort Liability Act were alternative solutions.

The Local Government Liability Act seeks to address several issues. It would provide uniform protection for the injured public statewide. In exchange for waiving sovereign immunity for governmental functions, it would cap local government liability for proprietary claims at \$1 million (a figure selected to be uniform with the \$1 million limit of the State's excess liability insurance policy). Local government employees would be indemnified for up to \$1 million and their liability would be capped at \$1 million except in certain specified intentional wrongdoing situations. Local governments would have a duty to defend, but would have a right of indemnification against an employee in certain specified situations. The draft would also make the liability of local government employees carrying out state functions the responsibility of the local government, which has more direct control and opportunity to manage the risk of those employees acts.

The State Employees Liability Act removes the Attorney General's discretion in defending state employees acting within the scope of their employment, but gives the State the right of indemnification against the state employee under certain specified situations. The draft raises the State's duty to defend employees up to \$1 million (equivalent to the excess liability insurance policy), eliminates the excess liability insurance policy and establishes the Defense of State Employees Reserve Fund.

As an alternative to the State Employees Liability Act, the State Tort Liability Act expands the State Torts Claims Act to include claims against state employees in addition to claims against state agencies, raises the limit from \$150,000 to \$1 million (equal to the current limit under the excess liability insurance policy), caps the employees personal liability at the tort claim limit except in certain specified intentional tort situations, and eliminates the excess liability insurance coverage.

Because the Committee was going to wait for comments on the governmental liability and immunity bills before considering them further, the Committee decided to

hear comments on four "private" immunity bills that had been introduced during the 1993 Session.

The first bill considered was HB 394 (1993 Session) - Immunity for Volunteer Engineers. Mr. Don Kline spoke on behalf of the N.C. Consulting Engineers Council and explained the liability concerns engineers have with volunteering to provide professional services without compensation in emergency/disaster situations. He said this bill would remove a hindrance for engineers to volunteer in these critical situations. In reviewing the bill with the Committee members, Mr. Kline said he would have no problem with excluding immunity for gross negligence or liability arising from the operation of a motor vehicle. He also agreed that the language involving the time period covered and how that could be extended could be clarified. Mr. Paul Goodson, representing the Professional Engineers of North Carolina, also spoke in favor of the bill. Mr. Pope "Mac" McCorkle, representing the Academy of Trial Lawyers, said the Academy agrees that where engineers are asked by the government to render assistance without compensation they should be protected, but the Academy feels the engineer should be treated as an agent of the local government for liability purposes and should be indemnified by the local government against any claims that arise.

The second bill considered was House Bill 952 (1993 Session) - Volunteer EMS Medical Directors Immunity. Dr. Don Vaughn, Medical Director for the Wake County Emergency Medical Service, spoke on the need to give physicians who volunteer as the medical director for a local emergency medical service without compensation, immunity for claims arising for actions or omissions which occur while the doctor is carrying out this function. Mr. Bob Bailey, Chief of the Office of Emergency Medical Services for the State of North Carolina, told the Committee of the problem some counties are having in recruiting volunteer medical directors, and explained the effect of limiting EMS services that can be performed under law when there is not a designated EMS medical director. Mr. Barry Britt spoke on behalf of the North Carolina Association of Emergency Medical Services Administrators and explained that this bill would benefit rural areas where paramedics are becoming more and more the main source of health care.

The third bill considered by the Committee was House Bill 36 (1993 Session) - Landowner Protection Act. Mr. Bob Slocum, representing the N.C. Forestry Association, pointed out that studies have shown that concern over liability is the single greatest impediment to opening private lands to public recreation and educational opportunities. Mr. Slocum informed the Committee of a previous North Carolina

immunity statute which created limited immunity in these situations which was in effect in North Carolina for many years that apparently got dropped off the books in 1971 when the fish and wildlife laws got recodified. Dr. Edwin J. Jones, Associate Professor with the Forestry Extension Service, explained the current law in North Carolina and discussed the concerns he had advised landowners about in this area. Mr. Tom Bean spoke on behalf of the North Carolina Wildlife Federation in favor of the bill and the need to find ways to expand natural areas available to the public, and to insure proper control of wildlife. Mr. Thomas S. Stark, President of the Sportsman's Alliance, spoke in favor of the bill and discussed the increasing problem hunters were having in finding suitable places to hunt. He also pointed out that landowner concern over liability seems to have increased as more and more counties were requiring written permission to hunt on the lands of another person.

Mac McCorkle, speaking on behalf of the Academy of Trial Lawyers, reminded the Committee that North Carolina's retention of the doctrine of contributory negligence was the biggest immunity provision you could have, and pointed out that most of the large verdicts in other states involving comparative negligence would have been zero verdicts in North Carolina. He also indicated that the Academy could agree with a codification of the common law which he felt provided adequate protection to landowners.

The fourth bill considered was a proposed committee substitute which Representative Dub Dickson had had prepared for House Bill 1018 (1993 Session) (blank bill) - Equine Liability. Mr. Greg Lee, President of the North Carolina Horse Council, spoke of the concern of horseowners over their liability for the actions of horses which were beyond the owner's control. He pointed out that many stables and riding programs in North Carolina were having to close down because of the high cost of liability insurance or the risk of being sued. Ms. Linda Harris, owner of a horse farm and riding stable in Statesville, explained to the Committee that this bill does not restrict or limit the liability of a horseowner for negligence, but merely defines the dividing line between what is negligence and what is the inherent risk of dealing with horses. Mr. Glenn Petty, Manager of the Hunt Horse Complex at the N.C. State Fairgrounds and the owner of a horse farm, pointed out that thirty other states had adopted similar legislation and had seen liability insurance rates remain stable while North Carolina's rates have steadily increased. Mr. Steve Mobley, Horse Marketing Specialist with the N.C. Department of Agriculture informed the Committee of the magnitude of the horse industry in the State.

Mac McCorkle, on behalf of the Academy of Trial Lawyers, explained that in North Carolina the doctrines of contributory negligence and assumption of the risks, already provided horseowners with protections that may not be found in other states. He said if a problem really exists, the Academy would agree with a codification of the common law. Mr. McCorkle pointed out numerous problems he had with the way the proposed committee substitute was written.

Fifth Meeting - November 15, 1994

At its fifth meeting, the Committee heard comments from various interested and involved parties on the three proposed bill drafts, the Local Government Liability Act, the State Employees Liability Act and the State Tort Liability Act.

The first group of speakers addressed the two state government drafts. Harry Bunting, Special Deputy Attorney General, expressed four concerns with the bills as drafted. His first concern was that the drafts would require the State to defend state employees in all civil cases, even when the State had a conflict of interest. As an example, he discussed a situation where an employee was fired, possibly as a result of some action leading to the employee being sued, and the employee might sue the State for a wrongful discharge. In that case the State would have to defend the employee in the civil suit, but would be defending itself against the employee in the wrongful discharge action. His second concern involved mandating indemnification of state employees at \$1 million but not raising the Tort Claims limit. Mr. Bunting said the effect would be that all plaintiffs would sue the employee in State court instead of just proceeding against the State before the Industrial Commission under the Tort Claims Act. His third concern involved the State Tort Liability Act, which as drafted, would require the employee to be sued before the Industrial Commission. Under present law, claims before the Industrial Commission are only brought against the State, so the employee is spared from being named as a defendant. Mr. Bunting's fourth concern, which he expressed as his biggest concern, was the effect raising the tort limit would have on individual agencies' budgets. As drafted, the agency continues to be responsible for the claims and judgments against the agency under the Tort Claims Act as well as the claims against the employee up to the Tort Claims limit. Under present law, the agency has to find this money from other budget items, often lapse salaries. He said agencies were having a hard enough time satisfying \$150,000 awards out of

their budgets. One million dollar awards would have a devastating effect on some agencies.

Mr. Dascheil Propes of the North Carolina Department of Insurance was the next speaker. He presented the Committee with a letter from the chair of the North Carolina Public Officers and Employees Liability Insurance Commission which expressed the Commission's suggestions and concerns with the drafts of the bills. Mr. Propes said he would like to see a liability cap established for state employees' personal liability, and to have the State stand in the employees' shoes for liability purposes, like the federal government does. He also asked for clarification on what types of insurance agencies would be authorized to obtain. He expressed his concerns about where state agencies would come up with the funds to satisfy \$1 million judgments. Mr. Propes furnished the Committee with the Travelers Insurance Company's estimate of the State's increased cost for raising auto liability coverage from \$150,000 to \$1 million, showing an estimated increase of \$3.37 million per year in the value of claims, with an additional \$1 million to raise the automobile excess coverage to \$10 million.

The next speaker was Jim Edgerton, Assistant to the Chief Engineer, Division of Highways, Department of Transportation. Mr. Edgerton expressed the need to indemnify state employees from claims arising in the scope of their employment. He gave examples where, out of fear, employees were transferring property out of their names into the names of their spouses and relatives in order to protect against losing their property if they are sued. Mr. Edgerton supported the concept of establishing a central liability pool and pointed out that by raising the tort claim limit, the value of small claims would increase. He warned that the cost to defend these higher claims would also be much higher.

The next speaker, Richard Robinson, Senior Legal Counsel to the President of the University of North Carolina, expressed two basic concerns the University had with the drafts: the mandatory duty to defend and where the money was to come from to pay for the increased claims. He noted that while state agencies can insure the liability for claims against their employees, the agency cannot insure for its own liability. Mr. Robinson pointed out four fundamental concepts these drafts would change: 1) it eliminates the concept of personal individual liability for wrongdoing; 2) it obliterates the doctrine of sovereign immunity; 3) it radically changes the concept of respondeat superior, by making the employer liable for the intentional torts of its employees; and, 4) it obliterates the concept of public officer immunity.

Kristine Lanning, Director of Governmental Relations for the N.C. State Employees Association, expressed appreciation for the Committee trying to protect state employees' personal liability, but expressed concern that by raising the amount available for plaintiffs to recover, less funds would be available for other State government needs. She was not aware of any complaint by a State employee that they had not been properly defended or that they were concerned about personal liability.

The next set of speakers spoke on the Local Government Liability Act. The first speaker was Jim Blackburn, General Counsel to the North Carolina Association of County Commissioners. Mr. Blackburn expressed his members' concerns over the complexity of this issue and some of the hidden effects he felt the Committee was not aware of.

The next speaker was Jeff Gledhill, County Attorney for Orange County, who pointed out that by specifying that county employees carrying out state functions are county employees for liability purposes, certain defenses now available in federal liability cases, including civil rights actions under Chapter 1983, would be given up. Under these actions, state employees are protected, but local governmental employees are not.

Andy Romanet, Legal Counsel to the North Carolina League of Municipalities, spoke next about the discomfort his members were having over trying to change six hundred years of common law too quickly. He recommended that the study be extended so that the full impact of the proposed changes could be analyzed. He pointed out that several cities had just floated bond issues based on current law. Their risk, and bond rating, could be significantly affected by the proposed changes.

The next speaker, DeWitt "Mac" McCarley, City Attorney for the City of Greenville, summarized four general areas of concerns that local governments have with the drafts. First is the principal that all governmental bodies, state and local, should be treated in an equally fair and uniform way. Second, local governments would like to see predictability and clarity in this area. Third, there are several recent court cases that have gone favorably for local governments on the public duty doctrine which they are reluctant to give up without knowing where they will stand after the changes proposed in the drafts. Fourth, they would like for the Committee, or another committee, to study these issues in greater detail before recommending any specific changes, so all the affected parties will know the effects of any changes.

Steve Shaber, representing the North Carolina Social Services Consortium, thanked the Committee for its hard work on behalf of child protective services social

workers. He felt that the issues also needed further study. He pointed out that the Local Government Liability Act still left local employees liable for claims over and above the amounts local government indemnified for. He also did not think employees should be liable for defense cost incurred in criminal actions arising within the scope of their employment, such as simple trespass or misdemeanor assault.

Next the Committee members discussed their individual thoughts on the issues addressed by the bill drafts and how the Committee should proceed with these governmental bills.

The Committee then heard from Judge Heman Clark, on behalf of the Professional Engineers of North Carolina, who said his group was still very interested in a bill to give immunity to volunteer engineers in emergency disaster situations, but they did not have a bill redrafted for the Committee's consideration at this time.

Lucia Peel, representing the North Carolina Medical Society, told the Committee her group was still trying to work out a bill with the Academy of Trial Lawyers to grant volunteer EMS Medical Directors immunity.

Next the Committee heard a report from Committee Counsel, O. Walker Reagan, on the liability of Registers of Deeds arising from Torren Title registration. This matter had originally been assigned by the Legislative Research Committee to the Courts Commission for study. After the Courts Commission decided they would not take any action on the issue, but they referred it to this Committee to look at the liability and immunity issues involved. After explaining the concept of Torrens registration, Mr. Reagan pointed out a letter from Mr. William Campbell, of the Institute of Government, expressing his opinion that Torrens registration did not create any greater liability for Registers of Deeds than any other recording or registration law, and that this issue did not need any further study. The Committee decided there did not appear to be any significant problem in this area and voted not to study this matter any further.

Sixth Meeting - December 6, 1994

At its sixth meeting, the Committee reviewed and revised draft provisions for the final report, including the summary of the Committee's proceedings, findings and recommendations and proposed bill drafts.

The Committee tentatively approved the bill draft granting immunity to volunteer EMS medical directors based on the incorporation of the changes suggested at the previous meeting.

The Committee reviewed the bill to give professional engineers limited immunity from claims arising out of voluntary services engineers provide in declared emergency/disaster situations. The Committee tentatively approved the draft which incorporated changes suggested at the previous meeting, including exclusion of acts of gross negligence from the immunity protection. The Committee heard arguments from Judge Heman Clark as to why the term "gross negligence" should be replaced a different, more specific standard.

The Committee also considered the draft of a bill which would tighten the Attorney General's duty to defend state employees. The Committee focused its consideration on how to handle the defense of state employees when the employee's position is in conflict with the position of the State. The Committee discussed how to provide an injured third party with a source of recovery when there is a conflict, how to be sure the Governor would authorize outside counsel when asked by the Attorney General to do so, and how negotiated settlements reached by outside counsel should be approved by the State. The Committee also discussed giving the State the option not to defend when the employee is charged with a criminal offense arising out of the same event which gives rise to the civil cause of action.

Next the Committee considered a bill which would have authorized the Public Officers and Employees Liability Insurance Commission to create a self-insurance trust for the State to provide for the state employee excess liability insurance protection, as a way of reducing the State's costs for liability protection. Included in this discussion was a discussion on how this liability protection should be funded. The Committee also considered whether the establishment of the trust should be mandatory, or discretionary.

The Committee also considered a bill draft which would have required local governments to indemnify their employees against claims arising in the course and scope of their employment for amounts up to \$1 million. The draft also proposes to make local employees who carry out state functions local employees for liability purposes. The Committee reviewed the local governments increased exposure under the bill, and the lack of uniformity with the State's duty to defend.

Next the Committee considered the bill draft to provide for the defense of child protective services social workers under the defense of state employees act and the state

employees excess liability protection. Mr. Steve Shaber, representing the Social Services Consortium, suggested that the scope of the bill be expanded to include foster care social workers and adult protective services workers.

The Committee reviewed a bill draft to provide for the continued study of governmental immunity and liability.

After reviewing the draft of the Committee Proceedings and the Findings and Recommendations, the Committee decided to leave all the drafts in the draft of the final report to be considered by the full Committee at its next meeting, and asked staff to incorporate the changes agreed to at this meeting.

Seventh Meeting - January 3, 1995

The Committee held its final meeting on January 3, 1995. The Committee reviewed and approved its final report to the Legislative Services Commission.

FINDINGS AND RECOMMENDATIONS

FINDINGS

During its seven meetings and as a result of hearing from over 38 speakers, the Immunity from Negligence Study Committee learned a great deal about liability and immunity. The Committee found that our tort system has evolved from a long history dating back to England, and that the current issues are complex with far reaching effects. It was found that the law has become an intricate maze of local, state and federal law, created by sometime inconsistent legislative action and ever changing case law.

While attempting to fulfill its charge of studying immunity from liability including the coordination of existing statutes, immunity of governmental employees and immunity of volunteers, the Committee found that there is no standard policy or practice found consistently in the law, including a lack of uniformity between governmental units, and the liability of the governmental unit, its public officials and its employees.

In examining the various immunities found in the statutes, three general types of immunity were identified: governmental immunity, volunteer immunity and private immunity. The Committee found that there was lack of consistency within the statutes not only between these different types of immunities, but also within individual groups of statutes. The Committee initially decided to hear the various problems with our current law and try to agree on some overriding principals to be applied when consideration is being given to granting or revoking immunity protection. But as the Committee got better educated on the problems, it became clear that the issue was more complex and required more time to study than the Committee had available.

GOVERNMENTAL IMMUNITY

While looking at governmental immunity, the Committee found that there are different laws affecting State government and local governments. Most State government functions are covered by the blanket immunity of sovereign immunity, under which the State cannot be sued for negligent acts without its consent. Local governments, on the other hand, also have sovereign immunity for governmental functions but no immunity for proprietary functions. The distinctions between what

functions are governmental and what are proprietary is not always clear, and a function that may be governmental for the State may be proprietary for a local government, such as road construction and maintenance programs. Governmental employees that are public officials have public official immunity by virtue of their position, but the law is not always clear about who is a public official, and the same person may be a public official when carrying out certain duties and not a public official when carrying out other duties.

The State has waived its sovereign immunity in limited situations under the Tort Claims Act. The State has also agreed to defend its employees from negligent acts arising in the scope of their employment, up to the limit of the Tort Claims Act. Individual agencies have authority to purchase insurance to protect their employees from claims in excess of the Tort Claims limit through a discretionary insurance policy obtained through the Public Officers and Employees Liability Insurance Commission, which basically provides non-automobile liability coverage up to \$1 million on most state employees. The State is currently paying \$560,000 a year in premium for this coverage which has paid out less than \$250,000 total in claims under this policy over the previous ten years.

State employees may be defended by the Attorney General's office. The Attorney General and the individual state government agencies have broad discretion in determining when the State will defend its employees, and the Attorney General has interpreted current law to say that if the Attorney General elects not to defend the State employee, the State will not pay any judgment entered against the employee. The Attorney General's discretion includes the right to determine if the State would have a conflict of interest in defending the employee, and if so, the State would not have to pay the claim.

Judgments awarded against the State, and settlements entered into by the State, under the Tort Claims Act are paid out of the individual agency's budget, often from lapsed salary money. State agencies are having increasing difficulties coming up with the money to satisfy these claims.

Although the Tort Claims limit was raised from \$100,000 to \$150,000 per claim effective October 1, 1994, this increase does not catch up with the increased cost due to inflation since the previous increase in 1979, which increased 205% from 1979 to 1993. The new limit is even further behind when compared to the increase in medical costs during this same period.

With the current state employees excess liability policy of \$1 million and a tort claim limit of \$150,000, the State's current arrangement encourages suits to be filed against State employees instead of just against the State. Even with the \$1 million liability policy, some state employees are concerned about their personal liability exposure arising from their job. Excluded from coverage under the policy are automobile liability claims and most medical malpractice claims.

While most local governments have some form of insurance or insurance-type coverage, the Committee found that not all local governments have liability insurance coverage for claims against the government and some local government employees have no protection from liability claims arising within the scope of their employment. Some local governments with insurance have high deductibles, some \$250,000 or more, thereby preserving the defense of sovereign immunity against claims under the deductible amount. Other local governments have set up "risk management" pools or funds which are used to pay liability claims. These pools or funds retain the governmental unit's sovereign immunity, but provides a mechanism for paying proprietary claims against the governmental unit and for defending local government employees when the governmental unit elects to do so.

The distinction between governmental functions and proprietary functions is not clear, and the lack of clarity is resulting in additional litigation, and is being used as leverage to negotiate settlements more favorable to the government. Some local governments use the threat of the sovereign immunity defense, coupled with a refusal to elect to defend a particular employee, to negotiate more favorable settlements.

There is a lack of uniformity of coverage and protection for persons injured by governmental acts and by governmental employees among local governments and between local governments and the State. A person injured by a state employee could possibly recover either \$150,000 under the Tort Claims Act, or \$150,000 under the Defense of State Employees Act, and an additional \$850,000 under the State Employees Excess Liability Insurance policy. If the same injury had been caused by a county employee, the injured person might be able to recover up to \$2 million dollars against a county or county employee insured by the N.C. Association of County Commissioners' insurance program, or may recover nothing from a county that has no insurance and has not insured its employees.

From its study, the Committee determined that the public is not uniformly protected from negligent acts of state and local governments and state and local

government employees. Also state and local employees are not uniformly protected from liability claims arising against them in the course and scope of their employment.

INDIVIDUAL IMMUNITY ISSUES

The Committee also looked at specific situations where immunity legislation had been considered by the General Assembly during the 1993 Session.

While examining the liability and immunity of child protective services social workers, the Committee found that claims against local county Departments of Social Services for negligent acts arising from child protective services investigations are now brought under the State Tort Claims Act, and judgments are paid by the N.C. Department of Human Resources. The county director of DSS is immune from liability claims as a public official but the individual child protective services social worker can be held personally liable. Most counties that provide liability insurance coverage for county employees including child protective services social workers.

From the study of the child protective services social worker situation, the Committee found that there are other local government employees who carry out state functions, similar to the child protection social workers, but it remains unclear as to whether the county or State is liable for the negligent acts of these local employees. In the child protective services situation, the State is liable but lacks the ability to supervise and control the employee and to manage its risks.

The Committee studied a bill to give volunteer EMS medical directors immunity under the Good Samaritan statute and found that some counties, generally smaller, rural counties, were having difficulty recruiting volunteer EMS medical directors in order to be able to provide higher levels of care through the EMS paramedics, because of the risk of liability.

The Committee studied a bill to give professional engineers who volunteer in declared emergency/disaster situations, volunteer immunity and found that professional engineers are reluctant to assist in disasters because their professional liability is unclear and they are concerned about the cost of defending themselves, often out of their own pockets, from claims that might arise from these situations. They would like to know clearly where their liability exists and where it does not.

At the request of the Courts Commission, the Committee examined the issue of the liability of Registers of Deeds arising from the Torrens Registration law, and found that the liability of Registers of Deeds in Torrens situations was no greater than the liability

in any other registration situation. Accordingly the Committee found that no recommendation nor proposed legislation was needed.

The Committee studied the liability of horseowners who operate riding stables and found that horseowners are concerned about the uncertainty of their liability under the law and the increased cost of liability insurance in North Carolina. The Committee found that the common law in North Carolina appears to provide horseowners with adequate protection.

The Committee studied the liability of landowners who open up their lands to others without substantial compensation for recreational purposes, including hunting and fishing. The Committee found that landowners, and their attorneys, are concerned about the uncertainty of their liability under the law in North Carolina. The Committee found that the common law in North Carolina appears to provide landowners with adequate protection.

REMAINING QUESTIONS

The Committee found that there were many important unanswered questions that should be studied further in this area including the following:

- 1) Should state and local government employees be indemnified or granted immunity from claims in excess of \$1 million?
- 2) Should public official immunity be defined statutorily, and should this immunity be modified in scope?
- 3) Should the distinction between governmental functions and proprietary functions be defined statutorily, modified, or eliminated?
- 4) Should the State raise the limits of coverage arising from automobile liability claims from \$150,000 to \$1 million?
- 5) Should the statutes relating to the liabilities of cities and counties be made more uniform?
- 6) Should the following terms and phrases be better defined:
 - Actual fraud, corruption or actual malice
 - Claim
 - Acting within the scope of authority or in the course of employment?
- 7) Under local government statutes, is the term "agent" too broad?
- 8) How should the liability of authorities be handled? What authorities should be included?
- 9) Should the public duty doctrine be modified and/or codified?
- 10) Should the State Tort Claims Act be modified to conform with the Federal Tort Claims Act, giving immunity to employees, requiring all claims to be brought against the State in court as a non-jury trial? If so, should there be a cap on the maximum amount which can be awarded for any claim?
- 11) Should some form of Local Government Tort Claims Act be adopted? If so, should sovereign immunity be waived in some manner in exchange for a cap on liability, for both proprietary and non-proprietary functions?

The Committee found that there is a definite need for further study of the issues related to State and local government liability and how the liability of state and local employees is handled. The statutory law is inconsistent in the way claims arising from negligent acts committed by the State and its employees and acts committed by local governments and their employees are handled. The courts are consistently reinterpreting the law in this area, with particular inconsistencies in the Court of Appeals. The effect of federal causes of actions against governmental employees creates other concerns not fully addressed by state law. The lack of uniformity across the state in citizens' ability to recover from local governments and government employees is a significant concern. The lack of uniformity across the state of liability protection for local government employees is also a significant concern.

RECOMMENDATIONS

RECOMMENDATION 1: That the General Assembly authorize the creation of an independent study commission to further study the liability and immunity of State and local governments and of State and local government employees. (See LEGISLATIVE PROPOSAL 1 at Appendix G).

RECOMMENDATION 2: That the General Assembly enact a law and provide funding for a self-insurance trust fund to provide professional liability insurance coverage for state employees, for claims of up to \$1 million. (See LEGISLATIVE PROPOSAL 2 at Appendix H).

RECOMMENDATION 3: That the General Assembly amend the Defense of State Employees Act to require the Attorney General to defend a state employee, except in certain limited situations, and to provide that if the Attorney General is unable to defend the employee due to a conflict of interest, the employee be provided other counsel and the State pay any resulting judgment as if the Attorney General had defended the employee. (See LEGISLATIVE PROPOSAL 3 at Appendix I).

RECOMMENDATION 4: That the General Assembly enact a law that would provide for the defense by the State under the Defense of State Employees Act, of county child and adult protective services social workers and county foster care social workers, for civil negligence actions, and that claims against these social workers be covered under the State Employees Excess Liability Insurance coverage for claims up to \$1 million dollars. (See LEGISLATIVE PROPOSAL 4 at Appendix J)

RECOMMENDATION 5: That the General Assembly amend G.S. 90-21.14, the medical Good Samaritan statute, to grant limited immunity to volunteer EMS medical directors for claims arising from the physician fulfilling the duties of EMS medical director. (See LEGISLATIVE PROPOSAL 5 at Appendix K).

RECOMMENDATION 6: That the General Assembly enact a law to grant limited immunity to professional engineers who volunteer to provide volunteer engineering services at the request of governmental officials in declared emergency/disaster situations. (See LEGISLATIVE PROPOSAL 6 at Appendix L).

APPENDIX A

HOUSE BILL 1319, 2ND EDITION

AN ACT TO AUTHORIZE STUDIES BY THE LEGISLATIVE RESEARCH COMMISSION, TO CREATE AND CONTINUE VARIOUS COMMITTEES AND COMMISSIONS, AND TO DIRECT VARIOUS STATE AGENCIES TO STUDY SPECIFIED ISSUES.

The General Assembly of North Carolina enacts:

PART I.-----TITLE

Section 1. This act shall be known as "The Studies Act of 1993".

PART II.-----LEGISLATIVE RESEARCH COMMISSION

Sec. 2.1. The Legislative Research Commission may study the topics listed below. Listed with each topic is the 1993 bill or resolution that originally proposed the issue or study and the name of the sponsor. The Commission may consider the original bill or resolution in determining the nature, scope, and aspects of the study. The topics are:

"...."

(17) Immunity from Liability Resulting from Negligent Acts (H.B. 242 - Nye and Jeffus),

"...."

Sec. 2.2. Committee Membership. For each Legislative Research Commission Committee created during the 1993-94 biennium, the cochairs of the Commission shall appoint the Committee membership.

Sec. 2.3. Reporting Dates. For each of the topics the Legislative Research Commission decides to study under this act or pursuant to G.S. 120-30.17(1), the Commission may report its findings, together with any recommended legislation, to the 1994 Regular Session of the 1993 General Assembly or the 1995 General Assembly, or both.

Sec. 2.4. Bills and Resolution References. The listing of the original bill or resolution in this Part is for reference purposes only and shall not be deemed to have incorporated by reference any of the substantive provisions contained in the original bill or resolution.

Sec. 2.5. Funding. From the funds available to the General Assembly, the Legislative Services Commission may allocate additional monies to fund the work of the Legislative Research Commission.

"...."

PART XI.-----APPROPRIATION FOR STUDIES

Sec. 11.1. From the appropriations to the General Assembly for studies, the Legislative Services Commission may allocate funds to conduct the studies authorized by this act.

PART XII.-----EFFECTIVE DATE

Sec. 12.1. This act is effective upon ratification. Part VI of this act is repealed on June 30, 1995.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

H

2

HOUSE BILL 242*
Committee Substitute Favorable 5/20/93

Short Title: Liability Study Commission.

(Public)

Sponsors:

Referred to:

February 24, 1993

1 A BILL TO BE ENTITLED

2 AN ACT TO AUTHORIZE THE LEGISLATIVE RESEARCH COMMISSION
3 TO STUDY ISSUES OF IMMUNITY FROM LIABILITY.

4 The General Assembly of North Carolina enacts:

5 Section 1. The Legislative Research Commission may study issues
6 concerning immunity from liability resulting from negligent acts, including the
7 coordination of existing statutes granting immunity, the immunity of State and
8 local employees and officials, and the immunity of volunteers including
9 volunteers of professional services.

10 Sec. 2. The Legislative Research Commission may make an interim
11 report to the 1993 General Assembly, 1994 Regular Session, and shall make a
12 final report to the 1995 General Assembly.

13 Sec. 3. There is appropriated from the General Fund to the
14 Legislative Research Commission the sum of fifteen thousand dollars (\$15,000)
15 for the 1993-94 fiscal year and the sum of fifteen thousand dollars (\$15,000)
16 for the 1994-95 fiscal year to fund the Legislative Research Commission study
17 authorized by this act.

18 Sec. 4. This act becomes effective July 1, 1993.



APPENDIX B

MEMBERSHIP OF LRC COMMITTEE ON IMMUNITY FROM NEGLIGENCE

LRC Member: Rep. Bertha M. Holt
P.O. Box 1111
Burlington, NC 27216
(910)227-7333

President Pro Tempore's Appointments

Sen. Leslie J. Winner, Cochair
2120 Greenway Avenue
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(704)376-8201

Sen. Robert C. Carpenter
180 Georgia Road
Franklin, NC 28734
(704)524-5009

Sen. Roy A. Cooper
P.O. Drawer 4538
Rocky Mount, NC 27803
(919)442-3115

Mr. Michael R. Ferrell
P.O. Box 550
Raleigh, NC 27602
(919)856-5500

Mr. Wayne Goodwin
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Rockingham, NC 28379
(910)997-5558

Sen. Wib Gulley
4803 Montvale Drive
Durham, NC 27705
(919)683-1584

Sen. Fountain Odom
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Staff:

Mr. Walker Reagan
Research Division
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Speaker's Appointments

Rep. Margaret M. Jeffus, Cochair
1803 Rolling Road
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(910)275-4762

Rep. Arlie F. Culp
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Ramseur, NC 27316
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Rep. William T. Culpepper, III
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Rep. Theresa H. Esposito
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Mr. James B. Maxwell
Attorney at Law
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Rep. Richard T. Moore
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Henderson, NC 27536
(919)438-4134

Rep. Edd Nye
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Elizabethtown, NC 28337
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Clerk:

Ms. Mary Lee Robinson
1307 Legislative Building
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Institute of Government

The University of North Carolina at Chapel Hill
CB# 3330 Knapp Building
UNC-CH
Chapel Hill, NC 27599-3330
919 966-5381

April 4, 1994

Senator Leslie Winner
North Carolina General Assembly
1412 Legislative Building
Raleigh, NC 27601-2808

Dear Senator Winner:

After the first meeting of the Study Committee on Immunity you asked me to provide some options for the committee as it explores way to reduce local government employees' vulnerability to liability while ensuring that those injured by the negligence of those employees have access to compensation. I can think of two options.

First, the committee could recommend that General Assembly create a local government tort claims act. Two models for such an act are North Carolina's State Tort Claims Act (NCTCA), along with related provisions governing the defense and indemnification of state employees, and the Federal Tort Claims Act.

Under the NCTCA, a plaintiff injured by the negligence of a state employee may bring a claim against the State in the Industrial Commission. [G.S. § 143-291] The State's liability is limited to \$100,000 for all claimants seeking compensation for injury to any one person. However, a plaintiff may simultaneously bring suit in superior court against the employee or employees responsible for the damage. There is no limit on the amount of damages available in such an action. (I don't claim to be an expert on the NCTCA. Harry Bunting of the Attorney General's staff is an excellent, if not entirely disinterested, source of information concerning it.)

Under G.S. §§ 143-300.3 and -300.4 the Attorney General may defend a state employee in a lawsuit unless: (1) the act or omission giving rise to liability was not within the scope of the employee's employment or authority, (2) the employee acted or failed to act because of actual fraud, corruption, or actual malice, (3) defense by the State would create a conflict of interest between the State and the employee, and (4) defense would not be in the State's best interests.

From the perspective of the employee, this statute is less than ideal. There are at least four problems with it. First, exception (4) covers a lot of ground. Second, at one time the Attorney General argued that under these provisions the State must decline to provide defense anytime the plaintiff alleged misconduct under the exception (2), even if the lawsuit contained claims of ordinary negligence and even if the Attorney General believed the plaintiff's allegations of intentional misconduct were groundless. Third, although I'm

sure this is not typical, in at least one case the State refused to provide defense to a medical professional sued for malpractice on the ground that malpractice is not within the scope of employment, saying, in effect, that the State will defend you so long as nobody claims you did anything wrong. Fourth, it is not clear whether the employee has any remedy against the State if the Attorney General refuses to provide a defense. At least one employee attempted to challenge such an action under the Administrative Procedure Act, but I don't know how that turned out.

Under G.S. § 143-300.6 the State may pay judgments and settlements obtained against state employees, but employees don't take a lot of comfort from this authority. This is primarily because those payments are limited to \$100,000 per claim on behalf of any one employee or group of employees alleged to be joint tortfeasors. Employees remain personally liable for judgments over that amount. Also, the Attorney General has opined that if the State does not provide a defense under G.S. § 143-300.3 it may not pay a judgment under G.S. § 143-300.6. [59 N.C.A.G. 21 (1989)] (It should be noted that the statute allowing for defense of local employees [G.S. § 160A-167] does not contain a monetary cap.)

Certain state agencies also have the authority to provide insurance coverage for employees, but I don't know how widespread that practice is or which employees are covered for what.

A local government tort claims act modeled on the NCTCA would increase the liability exposure of local governments by eliminating the sovereign immunity defense for governmental activities. If combined with a cap, however, it would decrease local governments' exposure to liability for proprietary activities. Such an act would also eliminate litigation over whether an activity was governmental or proprietary since the distinction would no longer matter.

Using the NCTCA as a model would not, however, change the basis of liability for local government employees. The NCTCA does not define the circumstances under which a state employee may be held liable for negligence, nor does it define the immunities available to state employees. The committee could, however, combine the NCTCA approach with a statute defining the extent and applicability of the existing common law public officials' immunity, or a statutory substitute for it.

The Federal Tort Claims Act (FTCA) makes the United States liable for damages to the same extent a private person or entity would be, subject to a number of exceptions. It differs from the NCTCA in several ways. The FTCA contains no limit on damages. FTCA suits are not heard in a special forum; claims are brought in or removed to U.S. District Court and are tried before a jury. The FTCA also bars suit against individual federal employees for acts committed within the scope and course of their employment. [28 U.S.C. §§ 2679 - 2680]

The FTCA contains a number of exceptions. Many of the exceptions concern specialized claims or claims against particular federal defendants that are either assigned to the jurisdiction of other judicial and quasi-judicial bodies or barred altogether. Another retains sovereign immunity in any case in which the employee involved would have been entitled to assert absolute legislative or judicial immunity. In addition, the FTCA does not allow claims arising out of "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." [28 U.S.C. § 2680(h)] Most important for purposes of this committee, the FTCA does not waive the federal government's sovereign immunity for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." [28 U.S.C. § 2680(a)]

This last exception responds to the notion that public employees should not have to be concerned about liability when undertaking tasks that require the exercise of judgment or that involve matters of public policy. In that regard, it is based on the same concerns that underlie North Carolina's common law doctrine of public officials' immunity. And the federal discretionary function exception is like North Carolina's public official immunity in that questions of its application generate lots of litigation.

The federal exception is different from public officials' immunity in two ways. First, it protects the government itself, not the public official. Second, it focuses on the nature of the decision to act or refrain from acting that gives rise to the lawsuit, not, as our doctrine does, on the duties of the office that the employee holds.

A local tort claims act based on the FTCA would be a big change for North Carolina, but it does protect public employees from liability without reducing the chances of those injured by those employees' negligence to obtain compensation. The committee could obviously tinker with the FTCA; it could, for example, suggest moving the claims into the Industrial Commission or some other forum, or suggest capping damages.

Another option for the committee is to recommend that the General Assembly amend G.S. § 160A-167 to require local governments to defend local employees in negligence actions and pay any resulting judgments. That statute now permits but does not require local governments to do that by buying insurance, by paying out of their own pockets, or by some combination of the two.

As a legal matter, requiring a local government to insure all its employees does not waive the local government's governmental immunity. Under G.S. §§ 153A-435 and 160A-485 a local government waives governmental immunity only to the extent the local government insures itself. However, from a fiscal standpoint, requiring local governments to provide liability insurance to all local employees should cost about the same amount as requiring them to buy insurance coverage for all of their activities, whether governmental or proprietary. This is because from the standpoint of an insurance underwriter once you

have covered all the employees covering the employer, which can only be liable vicariously, adds no additional financial exposure.

Although amending G.S. § 160A-167 seems simpler than drafting a local government tort claims act, it is not without its own difficulties. First, the committee would have to decide whether to limit the defenses and immunities that the insurer of the employee could assert. For example, G.S. §§ 153A-435 and 160A-485 prohibit an insurer of a local government to raise the defense of governmental immunity. The committee might recommend under this proposal that the insurer not be permitted to assert public officials' immunity as a defense when defending a local government employee.

Second, the committee would have to decide whether to require the local government to provide a minimum amount of insurance, and how to specify the scope of the insurance coverage. In addition, the committee would have to look into how to handle local governments that wish to self-insure.

Third, the committee would want to consider whether the employee, the local government, or both would be liable for judgments exceeding the amount of coverage, and for any punitive damages. With no change in current law, the rules would be as follows: The local government and the employee would be jointly and severally liable for judgments exceeding the amount of coverage when the tort occurred in the conduct of a proprietary activity. If a governmental activity were involved, only the employee would be liable; the local government could assert governmental immunity. Since insurance coverage typically excludes coverage for punitive damages, and since they may not be assessed against a local government, the employee would be individually liable for any punitive damages.

The matter of punitive damages brings up another matter about which you had a question -- the handling of intentional torts under the foregoing options. This issue has three parts. The first is when is an employer liable for the intentional torts of an employee? (On this point there is no difference between a public and private employer.) The second is when does a typical contract of insurance provide coverage for intentional torts? The third is how do the General Statutes governing defense and indemnification of state employees, the FTCA, and G.S. § 160A-167 treat intentional torts?

On the question of the liability of the employer for the intentional torts of an employee, the employer is liable if the tort was committed within the scope and course of employment. Usually, intentional torts are not within the scope and course of employment, but there are exceptions. In at least two reported North Carolina cases local governments have faced liability for batteries committed by employees based on the jury's authority to find that the employee was spurred to violence by a desire to protect the employer's interests, rather than by personal animosity.

Liability insurance on individual employees would almost certainly exclude coverage for any intentional torts, and in most cases the employer's would as well. However, in one

of the cases just mentioned the city had insurance and the insurer's attempt to deny coverage was unsuccessful. This issue always depends on the language of the insurance policy in question.

Finally, how do G.S. § 160A-167, the FTCA, and state law handle intentional torts? Under G.S. § 160A-167 a local government may defend a lawsuit brought against an employee for conduct arising in the scope and course of employment without regard to the nature of the allegations. However, a local government may not pay a judgment if the governing board finds that the employee's conduct involved "fraud, corruption, or actual malice." Precisely which intentional torts are covered by the formulation "fraud, corruption, or actual malice" is unclear to me.

The provisions governing the defense and indemnification of state employees contain provisions similar to those in G.S. § 160A-167, but they seem to require the Attorney General to decide if fraud, corruption, or actual malice were involved at the time the Attorney General is deciding whether to undertake a defense. The Attorney General also takes the position that if the State does not undertake to defend the employee it may not pay a judgment rendered against the employee.

Under the FTCA the judgment about whether the exception for intentional torts applies is based on the allegations of the plaintiff. If the plaintiff alleges a tort for which the U.S. has not waived sovereign immunity, the plaintiff's only remedy is against the individual employee and the U.S. Attorney General is not involved in the lawsuit.

If an intentional tort is alleged that is not on the list of FTCA exceptions (such as intentional infliction of emotional distress), the U.S. Attorney General must decide if the tort was committed in the scope and course of employment. If the Attorney General refuses to defend that decision can be reviewed by the U.S. District Court judge.

To sum up the discussion of intentional torts, I think it is fair to say that in most cases the victims of intentional injuries at the hands of government employees cannot recover damages from state, local, or federal governments, either because of a specific statutory prohibition or because the tort will be found to be outside of the scope of employment. (An interesting provision in the FTCA makes the federal government liable for assault, battery, false imprisonment, false arrest, abuse of process and malicious prosecution committed by "investigative or law enforcement officers." [28 U.S.C. § 2680(h)])

In accordance with the traditions of our profession I must close with a caveat. As I said when I spoke to the committee, this letter is based on my understanding of the state of the law of public liability before the court of appeals' most recent, successful attempts to place it beyond anyone's understanding. The committee still faces the challenge of making recommendations against a background of law that is moving fast and erratically.

I hope this is helpful to you and the committee. Please let me know if I can be of further service.

Yours truly,

A handwritten signature in black ink, appearing to read "Jeff Koeze". The signature is written in a cursive style with a large initial "J" and "K".

Jeff Koeze
Associate Professor
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NORTH CAROLINA GENERAL ASSEMBLY
SESSION 1995
DRAFT PROPOSED SENATE/HOUSE BILL

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SENATE/HOUSE 95-RU(IMMUN)-001
THIS IS A DRAFT 27-SEP-94 10:30:29

Short Title: Local Government Liability Act (Public)

Sponsors:

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO WAIVE SOVEREIGN IMMUNITY FOR LOCAL GOVERNMENTS FOR TORT
3 CLAIMS OF ONE MILLION DOLLARS OR LESS AND TO INDEMNIFY LOCAL
4 GOVERNMENT EMPLOYEES FOR UP TO ONE MILLION DOLLARS FOR TORT
5 CLAIMS ARISING IN THE COURSE OF THEIR EMPLOYMENT.
6 The General Assembly of North Carolina enacts:
7 Section 1. G.S. 153A-435 reads as rewritten:
8 "~~§ 153A-435. Liability insurance; damage~~ Damage suits against a
9 ~~county involving governmental functions.~~ county; liability
10 insurance permitted; waiver of immunity.
11 (a) A county shall be liable for claims made against it for
12 amounts up to the legal limit as set forth in G.S. 160A-485.1,
13 which arise as a result of negligence or the intentional act of
14 any officer, employee, involuntary servant, or agent of the
15 county while acting within the scope of the person's office,
16 employment, service, agency or authority, or as a result of
17 absolute liability for damage to person or property, under
18 circumstances where the county, if a private person, would be
19 liable to the claimant in accordance with the laws of North
20 Carolina, whether such claim arises from a governmental or
21 proprietary function. No liability shall arise from the exercise
22 of a legislative, judicial, or quasi-judicial function. A county
23 shall be immune from all claims arising out of the exercise of

1 legislative, judicial, or quasi-judicial functions and for that
2 portion of all claims in excess of the legal limit as set forth
3 in G.S. 160A-485.1, whether arising from a governmental or
4 proprietary function.

5 ~~(a)~~ (b) A county may contract to insure itself and any of its
6 officers, agents, or employees against liability for wrongful
7 ~~death or negligent or intentional damage to person or property of~~
8 ~~against absolute liability for damage to person or property~~
9 ~~caused by an act or omission of the county or of any of its~~
10 ~~officers, agents, or employees when acting within the scope of~~
11 ~~their authority and or the course of their employment, which~~
12 ~~arises as a result of negligence or the intentional act of any~~
13 ~~officer, employee, involuntary servant, or agent of the county~~
14 ~~while acting within the scope of the person's office, employment,~~
15 ~~service, agency or authority, or as a result of absolute~~
16 ~~liability, under circumstances where the county, if a private~~
17 ~~person, would be liable to the claimant in accordance with the~~
18 ~~laws of North Carolina, whether such claim arises from a~~
19 ~~governmental or proprietary function.~~ The board of commissioners
20 shall determine what liabilities and what officers, agents, and
21 employees shall be covered by any insurance purchased pursuant to
22 this subsection.

23 Purchase of insurance pursuant to this subsection for claims in
24 excess of the legal limit as set forth in G.S. 160A-485.1 waives
25 the county's governmental immunity, immunity as set forth in
26 subsection (a) of this section, to the extent of insurance
27 coverage, for any act or omission occurring in the exercise of a
28 governmental or proprietary function. Participation in a local
29 government risk pool pursuant to Article 23 of General Statute
30 Chapter 58 shall be deemed to be the purchase of insurance for
31 the purposes of this section. By entering into an insurance
32 contract with the county, an insurer waives any defense based
33 upon the ~~governmental~~ immunity of the county.

34 ~~(b)~~ (c) ~~If a county has waived its governmental immunity~~
35 ~~pursuant to subsection (a) of this section, any Any person, or if~~
36 ~~he dies, his the personal representative, representative of any~~
37 ~~deceased person, sustaining damages as a result of an act or~~
38 ~~omission of the county or any of its officers, agents, or~~
39 ~~employees, occurring in the exercise of a governmental function,~~
40 ~~in accordance with subsection (a) of this section may sue the~~
41 ~~county for recovery of damages, damages up to the legal limit or~~
42 ~~up to the limits of To the extent of the coverage of insurance~~
43 ~~purchased in excess of the legal limits, pursuant to subsection~~
44 ~~(a) of this section, governmental immunity Immunity may shall~~

1 not be a defense to the ~~action.~~ action, except as set forth in
2 subsection (a) of this section. Otherwise, however, the county
3 has all defenses available to private litigants in any action
4 brought pursuant to this section without restriction, limitation,
5 or other effect, whether the defense arises from common law or by
6 virtue of a statute.

7 Despite the purchase of insurance as authorized by subsection
8 ~~(a)~~ (b) of this section, section in excess of the legal limits
9 set forth in G.S. 160A-485, the liability of a county for acts or
10 omissions occurring in the exercise of governmental functions
11 does not attach unless the plaintiff waives the right to have all
12 issues of law or fact relating to insurance in the action
13 determined by a jury. The judge shall hear and determine these
14 issues without resort to a jury, and the jury shall be absent
15 during any motion, argument, testimony, or announcement of
16 findings of fact or conclusions of law relating to these issues
17 unless the defendant requests a jury trial on them.

18 (d) Any claims made against any county pursuant to this
19 section shall be submitted to a mandatory mediation settlement
20 conference conducted in accordance with rules adopted by the
21 Supreme Court as authorized by G.S. 7A-38, prior to trial."

22 Sec. 2. G.S. 160A-485 reads as rewritten:

23 "§ 160A-485. Waiver of immunity through insurance purchase.
24 Suits against a city; liability insurance permitted; waiver of
25 immunity.

26 (a) A city shall be liable for claims made against it for
27 amounts up to the legal limits as set forth in G.S. 160A-485.1,
28 which arise as a result of negligence or the intentional act of
29 any officer, employee, involuntary servant, or agent of the city
30 while acting within the scope of the person's office, employment,
31 service, agency or authority, or as a result of absolute
32 liability, under circumstances where the city, if a private
33 person, would be liable to the claimant in accordance with the
34 laws of North Carolina, whether such claim arises from a
35 governmental or proprietary function. No liability shall arise
36 from the exercise of a legislative, judicial, or quasi-judicial
37 function. The city shall be immune from all claims arising out
38 of the exercise of legislative, judicial, or quasi-judicial
39 functions and for that portion of all claims in excess of the
40 legal limit as set forth in G.S. 160A-485.1, whether arising from
41 a governmental or proprietary function.

42 (b) Any city is authorized to purchase liability insurance.
43 Any city is authorized to waive its immunity from civil liability
44 in tort for claims in excess of of the legal limit by the act of

1 purchasing liability insurance. Participation in a local
2 government risk pool pursuant to Article 29 of General Statute
3 Chapter 58 shall be deemed to be the purchase of insurance for
4 the purposes of this section. Immunity shall be waived for
5 claims in excess of the legal limit only to the extent that the
6 city is indemnified by the insurance contract from tort
7 liability. No formal action other than the purchase of liability
8 insurance shall be required to waive tort immunity, and no city
9 shall be deemed to have waived its tort immunity by any action
10 other than the purchase of liability insurance.

11 ~~(b)~~ (c) An insurance contract purchased pursuant to this
12 section may cover such torts and such officials, employees, and
13 agents of the city as the governing board may determine. The
14 city may purchase one or more insurance contracts, each covering
15 different torts or different officials, employees, or agents of
16 the city. An insurer who issues a contract of insurance to a
17 city pursuant to this section thereby waives any defense based
18 upon the ~~governmental~~ immunity of the city, and any defense based
19 upon lack of authority for the city to enter into the contract.
20 Each city is authorized to pay the lawful premiums for insurance
21 purchased pursuant to this section.

22 ~~(c)~~ (d) Any plaintiff may maintain a tort claim against a city
23 ~~insured~~ under this section in any court of competent
24 jurisdiction. As to any ~~such~~ claim in excess of the legal
25 limits, to the extent that the city is insured against such claim
26 pursuant to this section, ~~governmental~~ immunity shall be no
27 defense. Except as expressly provided herein, nothing in this
28 section shall be construed to deprive any city of any defense to
29 any tort claim lodged against it, or to restrict, limit, or
30 otherwise affect any defense that the city may have at common law
31 or by virtue of any statute. Nothing in this section shall
32 relieve a plaintiff from any duty to give notice of his claim to
33 the city, or to commence his action within the applicable period
34 of time limited by statute. No judgment may be entered against a
35 city in excess of its insurance policy limits on any tort claim
36 for which it would have been immune but for the purchase of
37 liability insurance pursuant to this section. No judgment may be
38 entered against a city on any tort claim for which it would have
39 been immune but for the purchase of liability insurance pursuant
40 to this section except a claim arising at a time when the city is
41 insured under an insurance contract purchased and issued pursuant
42 to this section. If, in the trial of any tort claim against a
43 city for which it would have been immune but for the purchase of
44 liability insurance pursuant to this section, a verdict is

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1 returned awarding damages to the plaintiff in excess of the
2 insurance limits, the presiding judge shall reduce the award to
3 the maximum policy limits before entering judgment.

4 ~~(d)~~ (e) Except as otherwise provided in this section, tort
5 claims against a city shall be governed by the North Carolina
6 Rules of Civil Procedure. No document or exhibit which relates
7 to or alleges facts as to the city's insurance against liability
8 shall be read, exhibited, or mentioned in the presence of the
9 trial jury in the trial of any claim brought pursuant to this
10 section, nor shall the plaintiff, his counsel, or anyone
11 testifying in his behalf directly or indirectly convey to the
12 jury any inference that the city's potential liability is covered
13 by insurance. No judgment may be entered against the city unless
14 the plaintiff waives his right to a jury trial on all issues of
15 law or fact relating to insurance coverage. All issues relating
16 to insurance coverage shall be heard and determined by the judge
17 without resort to a jury. The jury shall be absent during all
18 motions, arguments, testimony, or announcement of findings of
19 fact or conclusions of law with respect to insurance coverage.
20 The city may waive its right to have issues concerning insurance
21 coverage determined by the judge without a jury, and may request
22 a jury trial on these issues.

23 ~~(e) Nothing in this section shall apply to any claim in tort
24 against a city for which the city is not immune from liability
25 under the statutes or common law of this State.~~

26 (f) Any claims made against any city pursuant to this section
27 shall be submitted to a mandatory mediation settlement conference
28 conducted in accordance with rules adopted by the Supreme Court
29 as authorized by G.S. 7A-38, prior to trial."

30 Sec. 3. Article 21 of Chapter 160A of the General
31 Statutes is amended by adding a new section to read:

32 "§ 160A-485.1. Legal limits of city and county liability.

33 (a) Effective October 1, 1995, the legal limit of liability of
34 any city or county for damages which arise as a result of
35 negligence or the intentional act of any officer, employee,
36 involuntary servant, or agent of the city or county while acting
37 within the scope of the person's office, employment, service,
38 agency or authority, or as a result of absolute liability, under
39 circumstances where the city or county, if a private person,
40 would be liable to the claimant in accordance with the laws of
41 North Carolina, shall be \$1 million (\$1,000,000) cumulatively to
42 all claimants on account of injury and damages to any one person.
43 This limit shall be adjusted annually effective July 1 of each

1 year in accordance with the procedures set forth in subsection
2 (b) of this section.

3 (b) The legal limit of liability of any city or county shall
4 be adjusted effective July 1 of each year, beginning July 1,
5 1996, based on the percentage change in the U.S. Consumer Price
6 Index for All Urban Consumers for the most recent 12-month period
7 prior to January 1 of each year, as determined by the U.S.
8 Department of Labor, unless the General Assembly decides prior to
9 July 1 of each year that the legal limit shall not be adjusted or
10 the legal limit shall be adjusted by a lesser amount.

11 The change in the legal limit of liability of any city or
12 county shall be calculated by the Commissioner of Insurance based
13 upon the change in the consumer price index and the
14 Commissioner's determination shall be published in the North
15 Carolina Register not later than May 1st of each year.

16 (c) The new limits will apply to claims arising on or after
17 July 1st of each year."

18 Sec. 4. G.S. 160A-167 reads as rewritten:

19 "§160A-167. Defense of employees and officers; payment of
20 judgments.

21 (a) Upon request made by or in behalf of any member or former
22 member of the governing body of any authority, or any city,
23 county, or authority employee or officer, or former employee or
24 officer, or any member of a volunteer fire department or rescue
25 squad which receives public funds, or any volunteer while acting
26 as an agent or appointee of the governmental body, any city,
27 authority, county or county alcoholic beverage control board may
28 shall provide for the defense of any civil or criminal action or
29 proceeding proceeding, and may provide for the defense of any
30 criminal action or proceeding, brought against him either in his
31 official or in his individual capacity, or both, on account of
32 any act done or omission made, or any act allegedly done or
33 omission allegedly made, in the scope and course of his
34 employment or duty as an employee or officer of the city,
35 authority, county or county alcoholic beverage control board.
36 The defense may be provided by the city, authority, county or
37 county alcoholic beverage control board by its own counsel, or by
38 employing other counsel, or by purchasing insurance which
39 requires that the insurer provide the defense. Providing for a
40 defense pursuant to this section is hereby declared to be for a
41 public purpose, and the expenditure of funds therefor is hereby
42 declared to be a necessary expense. Nothing in this section
43 shall be deemed to require any city, authority, county or county
44 alcoholic beverage control board to provide for the defense of

~~1 any action or proceeding of any nature. The defense of public
2 official immunity shall not apply to claims defended pursuant to
3 this section, except no liability shall arise from the exercise
4 of a legislative, judicial or quasi-judicial function.~~

~~5 (b) Any city council or board of county commissioners may shall
6 appropriate funds for the purpose of paying all or part of a
7 claim made or any civil judgment entered against any of its
8 members or former members of the governing body of any authority,
9 or any city, county, or authority employees or officers, or
10 former employees or officers, up to the legal limits as set forth
11 in G.S. 160A-485.1, when such claim is made or such judgment is
12 rendered as damages on account of any act done or omission made,
13 or any act allegedly done or omission allegedly made, in the
14 scope and course of his employment or duty as an members or
15 former members [a member or former member] of the governing body
16 of any authority, or any city, county, or authority employee or
17 officer of the city, authority, or county; provided, however,
18 that nothing in this section shall authorize any city, authority,
19 or county to appropriate funds for the purpose of paying any
20 claim made or civil judgment entered against any of its members
21 or former members of the governing body of any authority, or any
22 city, county, or authority employees or officers or former
23 employees or officers if the city council or board of county
24 commissioners finds that such members or former members of the
25 governing body of any authority, or any city, county, or
26 authority employee or officer acted or failed to act because of
27 actual fraud, corruption or actual malice on his part. county.
28 Any city, authority, or county may purchase insurance coverage
29 for payment of claims or judgments pursuant to this section.
30 Nothing in this section shall be deemed to require any city,
31 authority, or county to pay any claim or judgment referred to
32 herein, and the purchase of insurance coverage for payment of any
33 such claim or judgment shall not be deemed an assumption of any
34 liability not covered by such insurance contract, and shall not
35 be deemed an assumption of liability for payment of any claim or
36 judgment in excess of the limits of coverage in such insurance
37 contract.~~

~~38 (c) Subsection (b) shall not authorize any city, authority, or
39 county to pay all or part of a claim made or civil judgment
40 entered unless (1) notice of the claim or litigation is given to
41 the city council, authority governing board, or board of county
42 commissioners as the case may be prior to the time that the claim
43 is settled or civil judgment is entered, and (2) the city
44 council, authority governing board, or board of county~~

~~1 commissioners as the case may be shall have adopted and made
2 available for public inspection, uniform standards under which
3 claims made or civil judgments entered against members or former
4 members of the governing body of any authority, or any city,
5 county, or authority employees or officers, or former employees
6 or officers, shall be paid. entered and the city, authority, or
7 county is made a party to any lawsuit. Any claim arising under
8 the provisions of this section shall be submitted to a mandatory
9 mediation settlement conference conducted in accordance with
10 rules adopted by the Supreme Court as authorized by G.S. 7A-38,
11 prior to trial.~~

12 (d) For the purposes of this section, "authority" means an
13 authority organized under Article 1 of Chapter 162A of the
14 General Statutes, the North Carolina Water and Sewer Authorities
15 Act.

16 (e) No member or former member of the governing body of any
17 authority, nor any city, county, or authority employee or
18 officer, or former employee or officer, nor any member of a
19 volunteer fire department or rescue squad which receives public
20 funds, or any volunteer while acting as an agent or appointee of
21 the governmental body, shall be personally liable for damages of
22 up to the legal limit as set forth in G.S. 160A-485.1, arising
23 from actions covered under subsection (a) of this section, nor
24 shall such person be liable for any claims for any damages for
25 which compensation is paid in accordance with G.S. 153A-435 or
26 G.S. 160A-485, except such person shall be personally liable for
27 that portion of claims in excess of the legal limit which arise
28 from the actual fraud, corruption or actual malice of the person,
29 and such person shall be liable to the governmental body for the
30 amount of damages paid by the governmental body for a claim
31 arising from this section and the cost of defending such person
32 under this section, upon a finding by a jury that the damages
33 arose from the actual fraud, corruption or actual malice of the
34 person, or at a time when the person's use of alcohol or illegal
35 drugs substantially impaired the person's judgment, or when the
36 person acted or failed to act directly contrary to instructions
37 from the person's superior, or directly contrary to advice of the
38 governmental attorney, or acted or failed to act in such a manner
39 as to constitute a misdemeanor or felony. There shall be no
40 joint or several liability between the governmental body and such
41 person for claims made pursuant to G.S. 153A-435 or G.S. 160A-
42 485.

43 (f) No member or former member of the governing body of any
44 authority, nor any city, county, or authority employee or

1 officer, or former employee or officer, nor any member of a
2 volunteer fire department or rescue squad which receives public
3 funds, nor any appointee of the governing body to a board,
4 committee or commission, shall be liable for any claims arising
5 from the exercise of a legislative, judicial, or quasi-judicial
6 function arising in the scope and course of such person's
7 employment.

8 (g) Except as otherwise specifically set forth in the general
9 Statutes, the liability for acts or omissions of local
10 governmental officials and employees, or former officials or
11 employees, who in whole or in part, carry out a state function or
12 responsibility, or who act as agents of the State, shall lie with
13 the employee and the local governmental body by whom the employee
14 is employed, as if that person had carried out a local
15 governmental function or responsibility. This subsection shall
16 apply to, but shall not be limited to, child protection social
17 workers, building code inspectors and public health employees."

18 Sec. 5. This act becomes effective October 1, 1995 and
19 applies to actions arising on or after that date.

IMMUNITY FROM NEGLIGENCE

ATTACHMENT TO
DRAFT OF LOCAL GOVERNMENT LIABILITY ACT - 9/27/94

LOCAL GOVERNMENT LIABILITY LINGERING QUESTIONS

- 1) WHAT HAPPENS TO DAMAGES IN EXCESS OF \$1 MILLION?
- 2) SHOULD THE FOLLOWING TERMS AND PHRASES BE BETTER DEFINED:
 - ACTUAL FRAUD, CORRUPTION OR ACTUAL MALICE
 - CLAIM
 - ACTING WITHIN THE SCOPE OF AUTHORITY OR IN THE COURSE OF EMPLOYMENT ?
- 3) IS THE TERM "AGENT" TOO BROAD?
- 4) HOW SHOULD THE LIABILITY OF AUTHORITIES BE HANDLED? WHAT AUTHORITIES SHOULD BE INCLUDED?
- 5) HOW WILL THE PUBLIC DUTY DOCTRINE BE AFFECTED AS A DEFENSE UNDER THE BILL?
- 6) SHOULD THE STATUTES RELATED TO THE LIABILITY OF CITIES AND COUNTIES BE MADE MORE UNIFORM?
- 7) IS THE LOCAL GOVERNMENT'S LIABILITY CLEAR WHEN NO SPECIFIC EMPLOYEE IS FOUND TO HAVE BEEN NEGLIGENT IN EITHER ACTING OR FAILING TO ACT?
- 8) IS THE CUMULATIVE LIABILITY LIMIT CLEAR? ARE THERE DIFFERENT LIMITATION PROBLEMS FOR PROPERTY DAMAGE VERSUS PERSONAL INJURY, WHERE PROPERTY IS HELD BY MORE THAN ONE PERSON?

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GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1995

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95-RU(IMMUN)-002
THIS IS A DRAFT 28-SEP-94 18:52:43

Short Title: State Employees Liability Act (Public)

Sponsors:

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO AMEND THE LAWS TO REQUIRE THE STATE TO DEFEND STATE
3 EMPLOYEES FROM TORT CLAIMS ARISING IN THE SCOPE OR COURSE OF
4 THEIR EMPLOYMENT.
5 The General Assembly of North Carolina enacts:
6 Section 1. G.S. 143-300.3 reads as rewritten:
7 "§143-300.3. Defense of State employees.
8 ~~Except as otherwise provided in G.S. 143-300.4, upon~~ Upon
9 request of an employee or former employee, the State ~~may shall~~
10 provide for the defense of any civil or ~~criminal~~ action or
11 ~~proceeding~~ proceeding, and may provide for the defense of any
12 criminal action or proceeding, brought against him in his
13 official or individual capacity, or both, on account of an act
14 done or omission made in the scope and course of his employment
15 as a State employee."
16 Sec. 2. G.S. 143-300.4 reads as rewritten:
17 "§143-300.4. Grounds for refusal of defense. Right of
18 indemnification.
19 ~~(a) The State shall refuse to provide for the defense of a~~
20 ~~civil or criminal action or proceeding brought against an~~
21 ~~employee or former employee if the State determines that:~~
22 ~~(1) The act or omission was not within the scope and~~
23 ~~course of his employment as a State employee; or~~

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1 ~~(2) The employee or former employee acted or failed to~~
2 ~~act because of actual fraud, corruption, or actual malice on his~~
3 ~~part; or~~

4 ~~(3) Defense of the action or proceeding by the State~~
5 ~~would create a conflict of interest between the State and the~~
6 ~~employee or former employee; or~~

7 ~~(4) Defense of the action or proceeding would not be in~~
8 ~~the best interests of the State.~~

9 ~~(b) The determinations required by subsection (a) of this~~
10 ~~section shall be made by the Attorney General. The Attorney~~
11 ~~General may delegate his authority to make these determinations~~
12 ~~to the chief administrative authority of any agency, institution,~~
13 ~~board, or commission whose employees are to be defended as~~
14 ~~provided by subdivision (3) or (4) of G.S. 143-300.5. Approval of~~
15 ~~the request by an employee or former employee for provision of~~
16 ~~defense shall raise a presumption that the determination~~
17 ~~required by this section had been made and that no grounds for~~
18 ~~refusal to defend were discovered.~~

19 The State shall have a right of indemnification from an
20 employee or former employee for whom the State provides a defense
21 or pays a judgment in accordance with G.S. 143-300.3, for the
22 amount of damages paid by the State for a claim arising from this
23 Article and the cost of defending such person under this Article,
24 upon a finding by a jury that the damages arose:

- 25 (1) from the actual fraud, corruption or actual malice of
26 the person;
27 (2) at a time when the person's use of alcohol or illegal
28 drugs substantially impaired the person's judgment;
29 (3) at a time when the person acted or failed to act
30 directly contrary to instructions from the person's
31 superior, or directly contrary to advice of the State's
32 attorney; or
33 (4) at a time when the person acted or failed to act in such
34 a manner as to constitute a misdemeanor or felony."

35 Sec. 3. G.S. 143-300.6 reads as rewritten:
36 "§ 143-300.6. Payments of judgments; compromise and settlement of
37 claims.

38 (a) Payment of Judgments and Settlements. In an action to
39 which this Article applies, the State shall pay (i) a final
40 judgment awarded in a court of competent jurisdiction against a
41 State employee or (ii) the amount due under a settlement of the
42 action under this section. The unit of State government by which
43 the employee was employed shall make the payment. This section
44 does not waive the sovereign immunity of the State with respect

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1 to any claim. A payment of a judgment or settlement of a claim
2 against a State employee or several State employees as joint
3 tort-feasors may not exceed the amount ~~payable for one claim~~
4 ~~under the Tort Claims Act.~~ of \$1 million cumulatively to all
5 claimants on account of injury and damages to any one person.

6 (b) Settlement of Claims. The Attorney General may compromise
7 and settle any claim covered by this section to the extent he
8 finds the claim valid. A settlement in excess of the limit
9 provided in subsection (a) must be approved by the employee. In
10 an action in which the Attorney General has stated in writing
11 that private counsel should be provided the employee because of a
12 conflict of interest between the employee and the State, a
13 settlement in excess of the limit provided in subsection (a) must
14 be approved by the private counsel.

15 (c) Other Insurance. The coverage afforded employees and
16 former employees under this Article shall be excess coverage over
17 any commercial liability insurance, other than insurance written
18 under G.S. 58-32-15, up to the limit provided in subsection (a)."

19 Sec. 4. G.S. 58-31-25 reads as rewritten:

20 "§ 58-31-25. Professional liability insurance for officials and
21 employees of the State.

22 When authorized by a specific appropriation by the General
23 Assembly, The the Commissioner may acquire professional liability
24 insurance covering the officers and employees of any State
25 department, institution or agency upon the request of such State
26 department, institution or agency. Premiums for such insurance
27 coverage shall be paid by the requesting department, institution
28 or agency at rates fixed by the Commissioner from funds made
29 available to it for the purpose. The Commissioner, in placing a
30 contract for such insurance is authorized to place such insurance
31 through the Public Officers and Employees' Liability Insurance
32 Commission, and shall exercise all efforts to place such
33 insurance through the said commission prior to attempting to
34 procure such insurance through any other source.

35 The Commissioner, pursuant to this section, may acquire
36 professional liability insurance covering the officers and
37 employees of a department, institution or agency of State
38 government only if the coverage to be provided by such policy is
39 coverage of claims in excess of the protection provided by
40 Articles 31 and 31A of Chapter 143 of the General Statutes.

41 The purchase, by any State department, institution or agency of
42 professional liability insurance covering the law-enforcement
43 officers, officers or employees of such department, institution
44 or agency shall not be construed as a waiver of any defense of

1 sovereign immunity by such department, institution or agency.
2 The purchase of such insurance shall not be deemed a waiver by
3 any employee of the defense of sovereign immunity to the extent
4 that such defense may be available to him.

5 The payment, by any State department, institution or agency of
6 funds as premiums for professional liability insurance through
7 the plan provided herein, covering the law-enforcement officers
8 or officials or employees of such department, institution or
9 agency is hereby declared to be for a public purpose."

10 Sec. 5. G.S. 58-32-15 reads as rewritten:

11 "§ 58-32-15. Professional liability insurance for State
12 officials.

13 (a) When authorized by a specific appropriation by the General
14 Assembly, The the Commission may acquire professional liability
15 insurance covering the officers and employees, or any group
16 thereof, of any State department, institution or agency or any
17 community college or technical college. Premiums for such
18 insurance shall be paid by the requesting department,
19 institution, agency, community college or technical college at
20 rates established by the Commission, from funds made available to
21 such department, institution, agency, community college or
22 technical college for the purpose.

23 (b) The Commission, pursuant to this section, may acquire
24 professional liability insurance covering the officers and
25 employees, or any group thereof, of a department, institution or
26 agency of State government or a community college or technical
27 college only if the coverage to be provided by the insurance
28 policy is in excess of the protection provided by Articles 31 and
29 31A of Chapter 143 of the General Statutes, other than the
30 protection provided by G.S. 143-300.9.

31 (c) The purchase, by any State department, institution,
32 agency, community college or technical college of professional
33 liability insurance covering the law-enforcement officers,
34 officers or employees of such department, institution, agency,
35 community college or technical college shall not be construed as
36 a waiver of any defense of sovereign immunity by such department,
37 institution, agency, community college or technical college. The
38 purchase of such insurance shall not be deemed a waiver by any
39 employee of the defense of sovereign immunity to the extent that
40 such defense may be available to him.

41 (d) The payment, by any State department, institution, agency,
42 community college or technical college of funds as premiums for
43 professional liability insurance through the plan provided
44 herein, covering the law-enforcement officers or officials or

1 employees of such department, institution, agency, community
2 college or technical college is hereby declared to be for a
3 public purpose."

4 Sec. 6. (a) There is hereby established in the
5 Department of Justice the Defense of State Employees Reserve
6 Fund. Monies appropriated to this fund shall be used for the
7 payment of claims settled or judgments entered, against state
8 employees for claims for which the State is responsible in
9 accordance with G.S. 143-300.6, in excess of the amount of the
10 State Tort Claim limit. The earnings on the funds held in this
11 reserve shall accrue to the fund and the funds in the reserve
12 shall not revert to the General Fund.

13 (b) Of the funds appropriated to the Department of Justice,
14 \$2,000,000 of the funds appropriated for the 1995-96 fiscal year
15 and \$500,000 of the funds appropriated for the 1996-97 fiscal
16 year shall be place in the reserve in accordance with the
17 provisions of this section.

18 (c) It is the intention of the General Assembly to place
19 sufficient additional funds in this reserve from time to time as
20 is determined to be necessary to cover potential claims for which
21 the State may be responsible in accordance with G.S. 143-300.6.

22 Sec. 7. Sections 1 through 5 of this act become
23 effective October 1, 1995 and apply to actions arising on or
24 after that date. Section 6 of this act becomes effective July 1,
25 1995.

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IMMUNITY FROM NEGLIGENCE

ATTACHMENT TO DRAFT OF STATE EMPLOYEES LIABILITY ACT - 9/28/94

STATE EMPLOYEE LIABILITY LINGERING QUESTIONS

- 1) HOW WILL PUBLIC OFFICIAL IMMUNITY BE AFFECTED BY THIS BILL?
- 2) ARE THERE OTHER STATUTES WHERE STATE EMPLOYEES ARE GRANTED IMMUNITY THAT SHOULD BE REPEALED IN ORDER FOR CLAIMS TO BE PERMITTED UNDER THIS BILL?
- 3) SHOULD A SPECIAL RESERVE BE PROVIDED FOR CATASTROPHIC LOSSES IN EXCESS OF \$1 MILLION?
- 4) WHAT WILL BE THE COST TO THE STATE FOR RAISING AUTO LIABILITY COVERAGE FROM \$150,000 TO \$1 MILLION?

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1 exercise of a legislative, judicial, or quasi-judicial function
2 arising in the scope and course of the person's employment. If
3 the Commission finds that there was such negligence on the part
4 of an officer, employee, involuntary servant or agent of the
5 State while acting within the scope of his office, employment,
6 service, agency or authority, which was the proximate cause of
7 the injury and that there was no contributory negligence on the
8 part of the claimant or the person in whose behalf the claim is
9 asserted, the Commission shall determine the amount of damages
10 which the claimant is entitled to be paid, including medical and
11 other expenses, and by appropriate order direct the payment of
12 such damages by the department, institution or agency concerned,
13 but in no event shall the amount of damages awarded exceed the
14 sum of one ~~hundred thousand~~ million dollars ~~(\$100,000)~~
15 (\$1,000,000) cumulatively to all claimants on account of injury
16 and damage to any one person. Community colleges and technical
17 colleges shall be deemed State agencies for purposes of this
18 Article. The fact that a claim may be brought under more than one
19 Article under this Chapter shall not increase the foregoing
20 maximum liability of the State.

21 (b) If a State agency, otherwise authorized to purchase
22 insurance, purchases a policy of commercial liability insurance
23 providing coverage in an amount at least equal to the limits of
24 the State Tort Claims Act, such insurance coverage shall be in
25 lieu of the State's obligation for payment under this Article."

26 Sec. 2. G.S. 143-299.2 reads as rewritten:

27 "§ 143-299.2. Limitation on payments by the State.

28 The maximum amount which the State may pay cumulatively to all
29 claimants on account of injury and damage to any one person,
30 whether the claim or claims are brought under this Article or
31 Article 31A or Article 31B, shall be one ~~hundred thousand~~ million
32 dollars (\$100,000), (\$1,000,000), less any commercial liability
33 insurance purchased by the State and applicable to the claim or
34 claims under G.S. 143-291(b), 143-300.6(c), or 143-300.16(c).
35 The fact that a claim or claims may be brought under more than
36 one Article under this Chapter shall not increase the above
37 maximum liability of the State."

38 Sec. 3. G.S. 143-300.3 reads as rewritten:

39 "§143-300.3. Defense of State employees.

40 (a) ~~Except as otherwise provided in G.S. 143-300.4, upon~~ Upon
41 request of an employee or former employee, the State ~~may~~ shall
42 provide for the defense of any civil or ~~criminal~~ action or
43 proceeding ~~proceeding~~, and may provide for the defense of any
44 criminal action or proceeding, brought against him in his

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1 official or individual capacity, or both, on account of an act
2 done or omission made in the scope and course of his employment
3 as a State employee. The defense of public official immunity
4 shall not apply to claims defended pursuant to this section,
5 except no liability shall arise from the exercise of a
6 legislative, judicial or quasi-judicial function.

7 (b) No State employee or former State employee shall be
8 personally liable for damages of up to the limit as set forth in
9 G.S. 143-299.2, arising from actions covered under G.S. 143-291,
10 nor shall such person be liable for any claims for any damages
11 for which compensation is paid in accordance with G.S. 143-291,
12 G.S. 143-295, or G.S. 143-300.1, except such person shall be
13 personally liable for that portion of claims in excess of the
14 legal limit which arise from the actual fraud, corruption or
15 actual malice of the person, and such person shall be liable to
16 the State for the amount of damages paid by the State for a claim
17 arising under Article 31 of this Chapter and the cost of
18 defending such person under this section, upon a finding by a
19 jury that the damages arose from the actual fraud, corruption or
20 actual malice of the person, or at a time when the person's use
21 of alcohol or illegal drugs substantially impaired the person's
22 judgment, or when the person acted or failed to act directly
23 contrary to instructions from the person's superior, or directly
24 contrary to advice of the State's attorney, or acted or failed to
25 act in such a manner as to constitute a misdemeanor or felony.
26 There shall be no joint or several liability between the State
27 and such person for claims made pursuant to Article 31 of this
28 Chapter.

29 (f) No employee or former employee shall be liable for any
30 claims arising from the exercise of a legislative, judicial, or
31 quasi-judicial function arising in the scope and course of such
32 person's employment."

33 Sec. 4. G.S. 143-300.4 is repealed. [Grounds for
34 refusal of defense]

35 Sec. 5. G.S. 143-300.6 reads as rewritten:

36 "§ 143-300.6. Payments of judgments; compromise and settlement of
37 claims.

38 (a) Payment of Judgments and Settlements. In an action to
39 which this Article applies, the State shall pay (i) a final
40 judgment awarded in a court of competent jurisdiction against a
41 State employee or (ii) the amount due under a settlement of the
42 action under this section. The unit of State government by which
43 the employee was employed shall make the payment. This section
44 does not waive the sovereign immunity of the State with respect

1 to any claim. A payment of a judgment or settlement of a claim
2 against a State employee or several State employees as joint
3 tort-feasors may not exceed the amount ~~payable for one claim~~
4 ~~under the Tort Claims Act.~~ of \$1 million cumulatively to all
5 claimants on account of injury and damages to any one person.

6 (b) Settlement of Claims. The Attorney General may compromise
7 and settle any claim covered by this section to the extent he
8 finds the claim valid. A settlement in excess of the limit
9 provided in subsection (a) must be approved by the employee. In
10 an action in which the Attorney General has stated in writing
11 that private counsel should be provided the employee because of a
12 conflict of interest between the employee and the State, a
13 settlement in excess of the limit provided in subsection (a) must
14 be approved by the private counsel.

15 (c) Other Insurance. The coverage afforded employees and
16 former employees under this Article shall be excess coverage over
17 any commercial liability insurance, other than insurance written
18 under G.S. 58-32-15, up to the limit provided in subsection (a)."

19 Sec. 6. G.S. 58-31-25 reads as rewritten:

20 "§ 58-31-25. Professional liability insurance for officials and
21 employees of the State.

22 When authorized by a specific appropriation by the General
23 Assembly, The the Commissioner may acquire professional liability
24 insurance covering the officers and employees of any State
25 department, institution or agency upon the request of such State
26 department, institution or agency. Premiums for such insurance
27 coverage shall be paid by the requesting department, institution
28 or agency at rates fixed by the Commissioner from funds made
29 available to it for the purpose. The Commissioner, in placing a
30 contract for such insurance is authorized to place such insurance
31 through the Public Officers and Employees' Liability Insurance
32 Commission, and shall exercise all efforts to place such
33 insurance through the said commission prior to attempting to
34 procure such insurance through any other source.

35 The Commissioner, pursuant to this section, may acquire
36 professional liability insurance covering the officers and
37 employees of a department, institution or agency of State
38 government only if the coverage to be provided by such policy is
39 coverage of claims in excess of the protection provided by
40 Articles 31 and 31A of Chapter 143 of the General Statutes.

41 The purchase, by any State department, institution or agency of
42 professional liability insurance covering the law-enforcement
43 officers, officers or employees of such department, institution
44 or agency shall not be construed as a waiver of any defense of

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1 sovereign immunity by such department, institution or agency.
2 The purchase of such insurance shall not be deemed a waiver by
3 any employee of the defense of sovereign immunity to the extent
4 that such defense may be available to him.

5 The payment, by any State department, institution or agency of
6 funds as premiums for professional liability insurance through
7 the plan provided herein, covering the law-enforcement officers
8 or officials or employees of such department, institution or
9 agency is hereby declared to be for a public purpose."

10 Sec. 7. G.S. 58-32-15 reads as rewritten:

11 "§ 58-32-15. Professional liability insurance for State
12 officials.

13 (a) When authorized by a specific appropriation by the General
14 Assembly, The the Commission may acquire professional liability
15 insurance covering the officers and employees, or any group
16 thereof, of any State department, institution or agency or any
17 community college or technical college. Premiums for such
18 insurance shall be paid by the requesting department,
19 institution, agency, community college or technical college at
20 rates established by the Commission, from funds made available to
21 such department, institution, agency, community college or
22 technical college for the purpose.

23 (b) The Commission, pursuant to this section, may acquire
24 professional liability insurance covering the officers and
25 employees, or any group thereof, of a department, institution or
26 agency of State government or a community college or technical
27 college only if the coverage to be provided by the insurance
28 policy is in excess of the protection provided by Articles 31 and
29 31A of Chapter 143 of the General Statutes, other than the
30 protection provided by G.S. 143-300.9.

31 (c) The purchase, by any State department, institution,
32 agency, community college or technical college of professional
33 liability insurance covering the law-enforcement officers,
34 officers or employees of such department, institution, agency,
35 community college or technical college shall not be construed as
36 a waiver of any defense of sovereign immunity by such department,
37 institution, agency, community college or technical college. The
38 purchase of such insurance shall not be deemed a waiver by any
39 employee of the defense of sovereign immunity to the extent that
40 such defense may be available to him.

41 (d) The payment, by any State department, institution, agency,
42 community college or technical college of funds as premiums for
43 professional liability insurance through the plan provided
44 herein, covering the law-enforcement officers or officials or

1 employees of such department, institution, agency, community
2 college or technical college is hereby declared to be for a
3 public purpose."

4 Sec. 8. This act becomes effective October 1, 1995 and
5 applies to actions arising on or after that date.

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IMMUNITY FROM NEGLIGENCE

ATTACHMENT TO DRAFT OF STATE TORT LIABILITY ACT - 9/26/94

STATE TORT LIABILITY ACT LINGERING QUESTIONS

- 1) HOW WILL PUBLIC OFFICIAL IMMUNITY BE AFFECTED BY THIS BILL?
- 2) ARE THERE OTHER STATUTES WHERE STATE EMPLOYEES ARE GRANTED IMMUNITY THAT SHOULD BE REPEALED IN ORDER FOR CLAIMS TO BE PERMITTED UNDER THIS BILL?
- 3) SHOULD A SPECIAL RESERVE BE PROVIDED FOR CATASTROPHIC LOSSES IN EXCESS OF \$1 MILLION?
- 4) WHAT WILL BE THE COST TO THE STATE FOR RAISING AUTO LIABILITY COVERAGE FROM \$150,000 TO \$1 MILLION?

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APPENDIX G

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

S/H

D

**95-RU(IMMUN)-010
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Short Title: Tort Liability/Immunity Study

(Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED

**AN ACT TO AUTHORIZE THE STATE AND LOCAL GOVERNMENT TORT
LIABILITY AND IMMUNITY STUDY COMMISSION.**

The General Assembly of North Carolina enacts:

**Section 1. (a) There is created the State and Local Government Tort
Liability and Immunity Study Commission to be composed of 20 members appointed as
follows:**

- (1) The President Pro Tempore of the Senate shall appoint four members
from the membership of the State Senate.**
- (2) The Speaker of the House of Representatives shall appoint four
members from the membership of the House of Representatives.**
- (3) The Governor shall appoint one member who shall be a representative
of the Department of Transportation.**
- (4) The Attorney General shall appoint one member who shall be a
representative of the Justice Department.**
- (5) The President of the University of North Carolina shall appoint one
member who shall be a faculty member of a North Carolina law
school, who is familiar with tort liability law.**
- (6) The President of the North Carolina Association of County
Commissioners shall appoint two members.**
- (7) The President of the North Carolina League of Municipalities shall
appoint two members.**

1 (8) The Public Officers and Employees Insurance Liability Commission
2 shall appoint one member.

3 (9) The President of the North Carolina State Employees Association shall
4 appoint one member.

5 (10) The President of the North Carolina State Bar shall appoint three
6 members, two of whom shall be experienced in plaintiff litigation
7 claims against governmental entities and one of whom shall be
8 experienced in plaintiff litigation claims under the Tort Claims Act.

9 (b) The President Pro Tempore of the Senate and the Speaker of the House of
10 Representatives shall each designate a cochair of the Commission from their appointees.
11 Either cochair may call the first meeting of the Commission.

12 (c) Members shall serve until the termination of the Commission or, in case of a
13 State legislator member, until the member does not file for reelection to the General
14 Assembly. Vacancies shall be filled in the same manner as the original appointments
15 were made.

16 Sec. 2. (a) The State and Local Government Tort Liability and Immunity
17 Study Commission shall study thoroughly:

18 (1) The liability and immunity of the State and its employees, how that
19 liability is defended, and how claims and judgments are paid;

20 (2) The State Tort Claims Act, the limits under the Act, how claims are
21 defended, and how claims and judgments are paid;

22 (3) The liability and immunity of local governments and other
23 subdivisions of the State, how that liability is defended, and how
24 claims and judgements are paid, and the lack of uniformity in this
25 area;

26 (4) The liability and immunity of local government employees, how that
27 liability is defended, and how claims and judgments are paid; and

28 (b) The Commission shall recommend changes to the law that will:

29 (1) Clarify the present law by removing inconsistencies and outdated
30 provisions;

31 (2) Provide State and local government entities with predictable liability;

32 (3) Provide injured persons with adequate compensation without regard to
33 where the injury occurred or by which government entity, or the
34 employee of a government entity, the person was injured.

35 (c) The Commission shall not study tort reform as it relates to the doctrine of
36 contributory negligence nor professional liability tort reform.

37 Sec. 3. Upon the request of the Cochairs of the Commission, and with the
38 prior approval of the Legislative Services Commission, the Legislative Administrative
39 Officer shall assign professional and clerical staff to assist in the work of the State and
40 Local Government Tort Liability and Immunity Study Commission. Clerical staff shall
41 be furnished to the Commission through the Offices of the House of Representatives
42 and Senate Supervisors of Clerks. The expenses of employment of the clerical staff
43 shall be borne by the Commission. With the prior approval of the Legislative Services
44 Commission, the State and Local Government Tort Liability and Immunity Study

1 Commission may hold its meetings in the State Legislative Building or the Legislative
2 Office Building.

3 Sec. 4. The Commission may submit an interim written report of its
4 findings and recommendations to the 1996 Session of the 1995 General Assembly and
5 shall submit a final written report of its findings and recommendations on or before the
6 convening of the 1997 Session of the General Assembly. All reports shall be filed with
7 the President Pro Tempore of the Senate and the Speaker of the House of
8 Representatives, the Principal Clerks of the Senate and the House of Representatives,
9 and the Legislative Librarian. Upon filing its final report, the Commission shall
10 terminate.

11 Sec. 5. Members of the Commission shall be paid per diem, subsistence,
12 and travel allowances as follows:

13 (1) Commission members who are also members of the General
14 Assembly, at the rate established in G.S. 120-3.1;

15 (2) Commission members who are officials or employees of the State or
16 local government agencies, at the rate established in G.S. 138-6;

17 (3) All other Commission members, at the rate established in G.S. 138-5.

18 Sec. 6. All State departments and agencies, and local governments and their
19 subdivisions shall cooperate with the Commission and, upon request, shall furnish to
20 the Commission and its staff any information in their possession or available to them.

21 Sec. 7. From the appropriations to the General Assembly, the Legislative
22 Services Commission shall allocate \$20,000 in fiscal year 1995-96 and \$20,000 in fiscal
23 year 1996-97 to conduct the study authorized by this act.

24 Sec. 8. This act is effective upon ratification.

1 institution, agency, community college or technical college for the purpose. purpose, as
2 provided in G.S. 58-32-17.

3 ~~(b) The Commission, pursuant to this section, may acquire professional liability~~
4 ~~insurance covering the officers and employees, or any group thereof, of a department,~~
5 ~~institution or agency of State government or a community college or technical college~~
6 ~~only if the coverage to be provided by the insurance policy is in excess of the~~
7 ~~protection provided by Articles 31 and 31A of Chapter 143 of the General Statutes,~~
8 ~~other than the protection provided by G.S. 143-300.9.~~

9 ~~(c) The purchase, by any State department, institution, agency, community college~~
10 ~~or technical college of professional liability insurance covering the law-enforcement~~
11 ~~officers, officers or employees of such department, institution, agency, community~~
12 ~~college or technical college shall not be construed as a waiver of any defense of~~
13 ~~sovereign immunity by such department, institution, agency, community college or~~
14 ~~technical college. The purchase of such insurance shall not be deemed a waiver by any~~
15 ~~employee of the defense of sovereign immunity to the extent that such defense may be~~
16 ~~available to him.~~

17 ~~(d) The payment, by any State department, institution, agency, community college~~
18 ~~or technical college of funds as premiums for professional liability insurance through~~
19 ~~the plan provided herein, covering the law-enforcement officers or officials or~~
20 ~~employees of such department, institution, agency, community college or technical~~
21 ~~college is hereby declared to be for a public purpose."~~

22 Sec. 2 Article 32 of Chapter 58 of the General Statutes is amended by
23 adding a new section to read:

24 "§ 58-32-16. Establishment and administration of self-insurance trust funds;
25 defense of actions against covered persons.

26 (a) In the event the Commission elects to act as self-insurer of a program of liability
27 insurance, it may establish one or more insurance trust accounts to be used only for the
28 purposes authorized by this Article; provided, however, such program of liability
29 insurance shall not be subject to regulation by the Commissioner of Insurance. The
30 Commission is authorized to receive and appropriate or transfer funds made for the
31 purposes of this section and to deposit such funds in the insurance trust accounts. All
32 expenses incurred in collecting, receiving and maintaining such funds and in otherwise
33 administering the self-insured program of liability insurance shall be paid from such
34 insurance trust accounts.

35 (b) Subject to the provisions of this Article, the Commission is authorized to adopt
36 rules for the establishment and administration of the self-insured program of liability
37 insurance, including, but not limited to, rules concerning the eligibility for and terms
38 and conditions of participation in the program, the assessment of changes against
39 participants, the management of the insurance trust accounts, and the negotiation,
40 settlement, litigation, and payment of claims.

41 (c) The Commission is authorized to create a Liability Insurance Trust Fund Council
42 composed of not more than 11 members. One member each shall be appointed by the
43 Attorney General, State Auditor, Commissioner of Insurance, the State Treasurer, and
44 the Director of the Office of State Budget and Management. The remaining members

1 shall be appointed by the Commission. Subject to the provisions of this Article and the
2 rules adopted by the Commission pursuant to the provision of this section, the
3 Commission may delegate to this Council the responsibility and authority for the
4 administration of the self-insured liability insurance program and of the insurance trust
5 accounts established pursuant to Article.

6 (d) Defenses of all suits or actions against an individual who is covered by a self-
7 insured program of liability insurance established by the Commission under the
8 provisions of this Article shall be provided by the Attorney General in accordance with
9 the provisions of G.S. 143-300.3, or other counsel in accordance with the provisions of
10 G.S. 143-300.4A. The cost of other counsel shall be paid from the self-insured fund.

11 (e) The coverage provided State employees by any self-insured program of liability
12 insurance established by the Commission pursuant to the provisions of this Article shall
13 not be deemed commercial liability insurance coverage within the meaning of G.S. 143-
14 300.6(c)."

15 Sec. 3. Article 32 of Chapter 58 of the General Statutes is amended by
16 adding a new section to read:

17 **"§ 58-32-17. Funding of self-insurance programs.**

18 (a) If the Commission elects to establish a self-insurance trust fund, the initial
19 contribution to the fund shall be determined by an independent actuary but shall be no
20 less than an amount to fully fund current and unreported claims. This shall insure
21 compliance with Governmental Accounting Board requirements. Annual contributions
22 to said fund shall be made in an amount to be determined each year by the Liability
23 Insurance Trust Fund Council upon the advice of an independent actuary and shall
24 include amounts necessary to pay all costs of administration of the self-insurance
25 program and claims adjustment including litigation in addition to amounts necessary to
26 pay claims. Contributions from state agencies shall be no greater than five dollars
27 (\$5.00) per employee until such time as the Liability Insurance Trust Fund Council,
28 with the advice of an independent actuary and the approval of the Commission,
29 determines that an annual contribution in a lesser amount will not impair the adequacy
30 of the fund to satisfy existing and potential claims for a period of three years. In the
31 event that the Council determines the amounts contributed to the fund are inadequate,
32 the Council shall recommend to the General Assembly whether the per employee cap
33 should be raised or whether a lump sum appropriation is needed to assure the adequacy
34 of the fund.

35 (b) Claims certified to be paid from the fund shall be paid in the order of award or
36 settlement. In the event that the fund created hereunder shall at any time have
37 insufficient funds to assure that both existing and future claims will be paid, the
38 Commission is authorized to borrow necessary amounts from the State Treasurer to
39 replenish the fund.

40 (c) Funds borrowed by the Commission to replenish the trust fund account shall be
41 repaid from revenues collected from the members. Members shall mean those entities,
42 agencies, departments or divisions of the State which directly contribute funds to the
43 self-insurance trust. In no event shall individuals be deemed members for the purposes
44 of this section."

1 Sec. 4. Article 32 of Chapter 58 of the General Statutes is amended by
2 adding a new section to read:

3 **"§ 58-32-18. Termination of fund.**

4 Any fund created under this Article may be terminated by the Commission upon
5 determination by the Commission that other satisfactory and adequate arrangements
6 have been made to assure that both existing and future claims or judgments against the
7 participants in the self-insurance program will be paid and satisfied. Upon the
8 termination of any fund pursuant to this section, the full amount remaining in such fund
9 upon termination less any outstanding indebtedness shall promptly be repaid and
10 allocated among the participating members according to their respective contributions
11 as determined by the Commission."

12 Sec. 5. Article 32 of Chapter 58 of the General Statutes is amended by
13 adding a new section to read:

14 **"§ 58-32-35. Sovereign immunity.**

15 Nothing in this Article shall be deemed to waive the sovereign immunity of the
16 State."

17 Sec. 6. Article 32 of Chapter 58 of the General Statutes is amended by
18 adding a new section to read:

19 **"§ 58-32-40. Confidentiality of records.**

20 Records, including all information, correspondence, investigations, and interviews,
21 concerning or pertaining to claims or potential claims against participants in any self-
22 insurance program created under this Article shall not be considered public records
23 under Chapter 132 of the General Statutes."

24 Sec. 7. There is appropriated from the General Fund to the Self-Insurance
25 Trust Fund Reserve the sum of three million dollars (\$3,000,000) for the 1995-96 fiscal
26 year and the sum of two million dollars (\$2,000,000) for the 1996-97 fiscal year.
27 Funds from the reserve shall be used to provide the initial funding for a self-insurance
28 trust fund if the Public Officers and Employees Liability Insurance Commission elects
29 to establish such a fund to provide state employee excess liability coverage in
30 accordance with Article 32 of Chapter 58 of the General Statutes.

31 Sec. 8. This act becomes effective July 1, 1995.

APPENDIX I

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

S/H

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95-RU(IMMUN)-008.1
THIS IS A DRAFT 4-JAN-95 11:26:02

Short Title: Duty to Defend State Employees

(Public)

Sponsors:

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO AMEND THE LAWS PROVIDING FOR THE DEFENSE OF STATE
3 EMPLOYEES FROM TORT CLAIMS ARISING IN THE SCOPE OR COURSE OF
4 THEIR EMPLOYMENT.
5 The General Assembly of North Carolina enacts:
6 Section 1. G.S. 143-300.3 reads as rewritten:
7 "**§143-300.3. Defense of State employees.**
8 Except as otherwise provided in G.S. 143-300.4, upon request of an employee or
9 former employee, the State ~~may~~ shall provide for the defense of any civil ~~or criminal~~
10 ~~action or proceeding~~ proceeding, and may provide for the defense of any criminal
11 action or proceeding, brought against him the employee in his the employee's official
12 or individual capacity, or both, on account of an act done or omission made in the
13 scope and course of his the employee's employment as a State employee."
14 Sec. 2. G.S. 143-300.4 reads as rewritten:
15 "**§143-300.4. Grounds for refusal of defense.**
16 (a) The State shall refuse to provide for the defense of a civil or criminal action or
17 proceeding brought against an employee or former employee if the State determines
18 that:
19 (1) The act or omission was not within the scope and course of ~~his~~ the
20 employee's employment as a State employee; or
21 (2) The employee or former employee acted or failed to act because of
22 ~~actual fraud, corruption, or actual malice on his part; or gross negligence, wanton~~
23 conduct, or intentional wrongdoing on the employee's part.

1 ~~(3) Defense of the action or proceeding by the State would create a conflict~~
2 ~~of interest between the State and the employee or former employee; or~~

3 ~~(4) Defense of the action or proceeding would not be in the best interests of~~
4 ~~the State.~~

5 (b) The determinations required by subsection (a) of this section shall be made by
6 the Attorney General. ~~The Attorney General may delegate his authority to make these~~
7 ~~determinations to the chief administrative authority of any agency, institution, board, or~~
8 ~~commission whose employees are to be defended as provided by subdivision (3) or (4)~~
9 ~~of G.S. 143-300.5.~~ Approval of the request by an employee or former employee for
10 provision of defense shall raise a presumption that the determination required by this
11 section had been made and that no grounds for refusal to defend were discovered."

12 Sec. 3. Article 31A of Chapter 143 is amended by adding a new section to
13 read:

14 "§ 143-300.4A. Conflict of interest.

15 Whenever the Attorney General determines that the defense of an action or
16 proceeding by the State would create a conflict of interest between the State and the
17 employee or former employee, and that a defense is otherwise required under G.S.
18 143-300.3 and G.S. 143-300.4, the Attorney General shall request the Governor to
19 authorize employment of other counsel as set forth in G.S. 143-300.5. In that event,
20 the Governor shall appoint other counsel."

21 Sec.4 G.S. 143-300.6 reads as rewritten:

22 "§ 143-300.6. Payments of judgments; compromise and settlement of claims.

23 (a) Payment of Judgments and Settlements. In an action to which this Article
24 applies, including an action where the State provides the defense of the employee, or
25 former employee, by employing other counsel pursuant to G.S. 143-300.4A, the State
26 shall pay (i) a final judgment awarded in a court of competent jurisdiction against a
27 State employee or (ii) the amount due under a settlement of the action under this
28 section. The unit of State government by which the employee was employed shall
29 make the payment, payment up to the amount payable under the Tort Claims Act, and
30 any additional payment due shall be paid from the coverage provided under G.S. 58-
31 32-15. The amount due under a settlement of an action under this section in which the
32 state employee is defended by counsel, other than the Attorney General, must be
33 reviewed and approved by the Commissioner of Insurance before the settlement
34 becomes binding on the State. This section does not waive the sovereign immunity of
35 the State with respect to any claim. A payment of a judgment or settlement of a claim
36 against a State employee or several State employees as joint tort-feasors may not
37 exceed the amount payable for one claim under the Tort Claims Act, of \$1 million
38 cumulatively to all claimants on account of injury and damages to any one person,
39 including any amount paid under the Tort Claims Act, except as otherwise limited.
40 Payment of a judgment or settlement of a claim against a State employee or several
41 State employees as joint tort-feasors shall be limited for recovery under this Article to
42 the amount payable for one claim under the Tort Claims Act for claims arising out of
43 the following incidences:

44 (1) operation of a motor vehicle, watercraft or aircraft;

- 1 (2) medical malpractice by a physician, surgeon, dentist, or x-ray
2 technician, or by medical personnel or non-medical personnel when
3 services or treatment is rendered at a hospital;
4 (3) nuclear liability;
5 (4) circumstances for which the State would be liable for workers
6 compensation, unemployment compensation, or disability
7 compensation;
8 (5) any governmental direction or request to test for, monitor, clean up,
9 remove, contain, treat, detoxify or neutralize pollutants;
10 (6) exposure to asbestos;
11 (7) sexual harassment;
12 (8) operations conducted by University of North Carolina Hospitals at
13 Chapel Hill;
14 (9) an action by one state employee against another state employee except
15 for claims arising out of employment related activities, discriminatory
16 practices, or equal protection claims;
17 (10) losses arising out of operations conducted by any department, board,
18 college, university or other agency of the State for which other
19 liability protection coverage applies.

20 This provision shall not otherwise limit the rights of recovery under any other
21 provision of law.

22 (b) Settlement of Claims. The Attorney General may compromise and settle any
23 claim covered by this section to the extent he finds the claim valid. A settlement in
24 excess of the limit provided in subsection (a) must be approved by the employee. In an
25 action in which the Attorney General has stated in writing that private counsel should
26 be provided the employee because of a conflict of interest between the employee and
27 the State, a settlement in excess of the limit provided in subsection (a) must be
28 approved by the private counsel.

29 (c) Other Insurance. The coverage afforded employees and former employees under
30 this Article shall be excess coverage over any commercial liability insurance, other than
31 insurance written under G.S. 58-32-15, up to the limit provided in subsection (a)."

32 Sec. 5. This act becomes effective October 1, 1995 and applies to actions arising
33 on or after that date.



APPENDIX J

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

S/H

D

95-RU(IMMUN)-006
THIS IS A DRAFT 4-JAN-95 11:26:03

Short Title: Defense of Social Workers

(Public)

Sponsors:

Referred to:

1 A BILL TO BE ENTITLED

2 AN ACT TO REQUIRE THE STATE TO DEFEND COUNTY CHILD PROTECTIVE
3 SERVICES SOCIAL WORKERS, ADULT PROTECTIVE SERVICES SOCIAL
4 WORKERS AND FOSTER CARE SOCIAL WORKERS FROM LIABILITY
5 ARISING FROM THE PERFORMANCE OF THEIR OFFICIAL DUTIES.

6 The General Assembly of North Carolina enacts:

7 Section 1. Article 31A of Chapter 143 of the General Statutes is amended
8 by adding a new section to read:

9 "§ 143-300.11. Defense of county protective services social workers and county
10 foster care social workers.

11 Any county social worker currently or formerly employed by a county Department of
12 Social Services performing the official duties of the social worker's position as either a
13 juvenile protective services social worker pursuant to Article 44 of Chapter 7A of the
14 General Statutes, an adult protective services social worker pursuant to Article 6 of
15 Chapter 108A of the General Statutes, or a foster care social worker performing duties
16 assigned or delegated by the county director of social services pursuant to G.S. 108A-
17 14(12) of the General Statutes, shall be defended by the State, subject to the provisions
18 of G.S. 143-300.4 and G.S. 143-300.4A of the General Statutes, and shall be protected
19 from liability in accordance with the provisions of this Article, in any civil or criminal
20 action or proceeding brought against the social worker in the social worker's official or
21 individual capacity, or both, on account of an act done or omission made in the scope
22 and course of carrying out the provisions of either Article 44 of Chapter 7A, Article 6
23 of Chapter 108A, or G.S. 108A-14(12) of the General Statutes. The social worker

1 shall be considered an employee of the Department of Human Resources only for
2 purposes of G.S. 143-300.6 and for purposes of liability coverage under G.S. 58-32-
3 15."

4 Sec. 2. This act becomes effective October 1, 1995 and applies to all
5 actions arising on or after that date, but before October 1, 1997.

APPENDIX K

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

S/H

D

95-RU(IMMUN)-013
THIS IS A DRAFT 4-JAN-95 11:26:04

Short Title: Vol EMS Med Dir/Good Samaritan

(Public)

Sponsors:

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO CLARIFY THAT UNPAID VOLUNTEER MEDICAL DIRECTORS FOR
3 EMERGENCY MEDICAL SERVICES (EMS) AGENCIES ARE INCLUDED
4 UNDER THE GOOD SAMARITAN STATUTE.
5 The General Assembly of North Carolina enacts:
6 Section 1. G.S. 90-21.14 reads as rewritten:
7 "**§ 90-21.14. First aid or emergency treatment; liability limitation.**
8 (a) Any person, including a volunteer medical or health care provider at a facility of
9 a local health department as defined in G.S. 130A-2 or at a nonprofit community
10 health center or a volunteer member of a rescue squad, who receives no compensation
11 for his services as an emergency medical care provider, who renders first aid or
12 emergency health care treatment to a person who is unconscious, ill or injured,
13 (1) When the reasonably apparent circumstances require prompt decisions
14 and actions in medical or other health care, and
15 (2) When the necessity of immediate health care treatment is so
16 reasonably apparent that any delay in the rendering of the treatment
17 would seriously worsen the physical condition or endanger the life of
18 the person,
19 shall not be liable for damages for injuries alleged to have been sustained by the person
20 or for damages for the death of the person alleged to have occurred by reason of an act
21 or omission in the rendering of the treatment unless it is established that the injuries
22 were or the death was caused by gross negligence, wanton conduct or intentional
23 wrongdoing on the part of the person rendering the treatment.

- 1 (a1) (1) Any volunteer medical or health care provider at a facility of a local
2 health department or at a nonprofit community health ~~center; or~~
3 center;
4 (2) Any volunteer medical or health care provider rendering services to a
5 patient referred by a local health department as defined in G.S. 130A-
6 2(5) or nonprofit community health center at the provider's place of
7 employment, employment; or
8 (3) Any volunteer medical or health care provider serving as medical
9 director of an emergency medical service (EMS) agency,

10 who receives no compensation for medical services or other related services rendered at
11 ~~the facility or center~~ facility, center or agency or, who neither charges nor receives a
12 fee for medical services rendered to the patient referred by a local health department or
13 nonprofit community health center at the provider's place of employment shall not be
14 liable for damages for injuries or death alleged to have occurred by reason of an act or
15 omission in the rendering of the services unless it is established that the injuries or
16 death were caused by gross negligence, wanton conduct, or intentional wrongdoing on
17 the part of the person rendering the services. The local health department ~~facility or~~
18 facility, nonprofit community health center center, or agency shall use due care in the
19 selection of volunteer medical or health care providers, and this subsection shall not
20 excuse the health department ~~facility or~~ facility, community health center center, or
21 agency for the failure of the volunteer medical or health care provider to use ordinary
22 care in the provision of medical services to its patients.

23 (b) Nothing in this section shall be deemed or construed to relieve any person from
24 liability for damages for injury or death caused by an act or omission on the part of
25 such person while rendering health care services in the normal and ordinary course of
26 his business or profession. Services provided by a volunteer health care provider who
27 receives no compensation for his services and who renders first aid or emergency
28 treatment to members of athletic teams are deemed not to be in the normal and
29 ordinary course of the volunteer health care provider's business or profession. Services
30 provided by a medical or health care provider who receives no compensation for his
31 services and who voluntarily renders such services at facilities of local health
32 departments as defined in G.S. 130A-2 or at a nonprofit community health center, or
33 as a volunteer medical director of an emergency medical service (EMS) agency, are
34 deemed not to be in the normal and ordinary course of the volunteer medical or health
35 care provider's business or profession.

36 (c) In the event of any conflict between the provisions of this section and those of
37 G.S. 20-166(d), the provisions of G.S. 20-166(d) shall control and continue in full
38 force and effect.

39 Sec. 2. This act is effective upon ratification and applies to services rendered
40 on or after that date.

APPENDIX L

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

S/H

D

95-RU(IMMUN)-012
THIS IS A DRAFT 4-JAN-95 11:26:04

Short Title: Immunity For Volunteer Engineers.

(Public)

Sponsors:

Referred to:

1 A BILL TO BE ENTITLED

2 AN ACT TO PROVIDE QUALIFIED IMMUNITY TO PROFESSIONAL
3 ENGINEERS WHO VOLUNTARILY PROVIDE ENGINEERING SERVICES
4 DURING AN EMERGENCY WITHOUT COMPENSATION.

5 The General Assembly of North Carolina enacts:

6 Section 1. Chapter 89C of the General Statutes is amended by adding a
7 new section to read:

8 "§ 89C-19.1. Engineer who volunteers during an emergency; qualified immunity.

9 (a) Any professional engineer who voluntarily, without compensation, provides
10 structural, electrical, mechanical, or other engineering services at the scene of a
11 declared emergency, whether national, State, or local, arising from a major earthquake,
12 hurricane, tornado, fire, explosion, collapse, or other similar disaster or catastrophic
13 event, at the request of a public official, law enforcement official, public safety official,
14 or building inspection official, acting in an official capacity, shall not be liable for any
15 personal injury, wrongful death, property damage, or other loss caused by the
16 professional engineer's acts or omissions in the performance of the engineering
17 services.

18 (b) The immunity provided in subsection (a) of this section applies only to an
19 engineering service:

20 (1) For any structure, building, piping, or other engineered system, either
21 publicly or privately owned.

22 (2) That occurs within 45 days of the declaration of the emergency,
23 disaster, or catastrophic event, unless the 45-day immunity period is

1 extended by an executive order issued by the Governor under the
2 Governor's emergency executive powers.

3 (c) The immunity provided in subsection (a) of this section does not apply if it is
4 determined that the personal injury, wrongful death, property damage, or other loss
5 was caused by the gross negligence, wanton conduct, or intentional wrongdoing of the
6 professional engineer, or while the professional engineer was operating or responsible
7 for the operation of a motor vehicle.

8 (d) As used in this section:

9 (1) 'Building inspection official' means any appointed or elected federal,
10 State, or local official with overall executive responsibility to
11 coordinate building inspection in the jurisdiction in which the
12 emergency, disaster, or catastrophic event has occurred.

13 (2) 'Law enforcement official' means any appointed or elected federal,
14 State, or local official with overall executive responsibility to
15 coordinate law enforcement in the jurisdiction in which the
16 emergency, disaster, or catastrophic event has occurred.

17 (3) 'Public official' means any federal, State, or locally elected official
18 with overall executive responsibility in the jurisdiction in which the
19 emergency, disaster, or catastrophic event has occurred.

20 (4) 'Public safety official' means any appointed or elected federal, State,
21 or local official with overall executive responsibility to coordinate
22 public safety in the jurisdiction in which the emergency, disaster, or
23 catastrophic event has occurred."

24 Sec. 2. This act is effective upon ratification and applies to any cause of
25 action that arises on or after that date.

